Supreme Court, U.S.
FILED
OCT - 3 2002
OFFICE OF THE CLERK

No. 02 544

In The
Supreme Court of the United States

JIM HODGES, Governor of the State of South Carolina, in his official capacity,

Petitioner,

v.

SPENCER ABRAHAM, Secretary of the Department of Energy, in his official capacity, and the UNITED STATES DEPARTMENT OF ENERGY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

WILLIAM L. WANT
171 Church St., Suite 300
Charleston, SC 29401
(843) 723-5148

STEPHEN P. BATES
Chief Legal Counsel
OFFICE OF THE GOVERNOR
P.O. Box 11829
Columbia, SC 29211
(803) 734-6313

LISA HEINZERLING
Counsel of Record
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave., NW
Washington, DC 20001
(202) 662-9115

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

160 pp

QUESTIONS PRESENTED

1. Whether the Fourth Circuit erred in holding, contrary to the decisions of this Court and of other circuits, that agency compliance with the National Environmental Policy Act necessarily implies that agency action cannot be deemed arbitrary and capricious under the Administrative Procedure Act.

2. Whether the Fourth Circuit erred in holding that the National Environmental Policy Act (NEPA) did not require the United States Department of Energy to prepare any new NEPA documents when it decided to: designate South Carolina as the nation's only consolidated, long-term disposal site for weapons-grade plutonium; make storage of plutonium in South Carolina independent of any plans to process it for ultimate disposal; and eliminate one of the planned methods of disposal.

LIST OF PARTIES

In addition to the parties listed in the caption, the following were intervenors below: Media General Operations, Incorporated, d/b/a Morning News (Florence), WBTW, WSPA, WCBD and WJBF; Aiken Communications, Incorporated, d/b/a The Standard (Aiken); Osteen Publishing Company, Incorporated, d/b/a The Item (Sumter); East Coast Newspapers, Incorporated, d/b/a Island Packet, d/b/a The Herald (Rock Hill), d/b/a the Beaufort Gazette; The Evening Post Publishing Company, d/b/a The Post and Courier (Charleston); Columbia Newspapers, Incorporated, d/b/a The State (Columbia); the Sun Publishing Company, Incorporated, d/b/a Sun News; The New York Times Company, d/b/a The Herald-Journal (Spartanburg); Independent Publishing Company, Incorporated, d/b/a Anderson Independent-Mail; Landmark Community Newspapers of South Carolina, d/b/a The Lancaster News; Jefferson-Pilot Communications Company, d/b/a WCSC; Pacific and Southern Company, Incorporated, d/b/a WLTX; The South Carolina Press Association; South Carolina Broadcasters; Associated Press; and Lee Enterprises, Incorporated, d/b/a The Times and Democrat.

RULE 14.1(b) AND 29.6 STATEMENT

Petitioner Jim Hodges is the Governor of South Carolina.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
RULE 14.1(b) AND 29.6 STATEMENT	ii
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT STATUTORY PROVISIONS	1
STATEMENT	1
1. Introduction	1
2. Statutory and Regulatory Background	3
3. The Department of Energy's Decisions	6
a. Decisions Before April 2002	6
b. DOE's Reversal of Course	10
4. Proceedings Below	13
REASONS FOR GRANTING THE PETITION	15
CONCLUSION	27

TABLE OF AUTHORITIES

Page

CASES

Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 289 (1975) 17

Bennett v. Spear, 520 U.S. 154 (1997) 18

Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991) 23

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962) 4

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 4, 23

Environmental Defense Fund, Inc. v. U.S. Environmental Protection Agency, 485 F.2d 780 (D.C. Cir. 1973) 21

Federal Maritime Commission v. South Carolina State Ports Authority, 122 S.Ct. 1864 (2002) 23

Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989) 24

Maryland Dep't of Human Res. v. United States Dep't of Agric., 976 F.2d 1462 (4th Cir. 1992) 14

Metcalf v. Daley, 214 F.3d 1135 (9th Cir. 2000) 26

Motor Vehicle Mfrs' Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29 (1983) 4

Native Ecosystems Council v. Dombeck, 2002 U.S. App. LEXIS 18845 (9th Cir. Sept. 17, 2002) 21

New York v. United States, 505 U.S. 144 (1992) 3, 21

Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. 190 (1983) 3, 22

TABLE OF AUTHORITIES – Continued

Page

Sierra Club v. Marsh, 872 F.2d 497 (1st Cir. 1989) 26

Sierra Club v. U.S. Army Corps of Engineers, 701 F.2d 1011 (2d Cir. 1983) 21

Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980) 18

United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973) 17

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978) .. 17, 18, 19

STATUTES

5 U.S.C. § 551 1

5 U.S.C. § 706(2)(A) 4, 14

28 U.S.C. § 1254(1) 1

42 U.S.C. § 4321 1

42 U.S.C. § 4332(C) 4

42 U.S.C. § 4334 16

42 U.S.C. § 4335 16

42 U.S.C. § 4341 16

MISCELLANEOUS

10 C.F.R. § 1021.104 4

10 C.F.R. § 1021.321(a) 4

10 C.F.R. § 1021.400 (Subpart D, Appendix D-10) 25-26

10 C.F.R. § 1021.400(d) 4

40 C.F.R. § 1508.9 4

TABLE OF AUTHORITIES – Continued

Page

DOE, *Amended Record of Decision, Surplus Plutonium Disposition Program*, 67 Fed. Reg. 19432 (Apr. 19, 2002) 12, 26

DOE, *Record of Decision for the Storage and Disposition of Weapons-Usable Fissile Materials Final Programmatic Environmental Impact Statement*, 62 Fed. Reg. 3014 (Jan. 21, 1997) 6

DOE, *Record of Decision on Final E.I.S. Summary*, 65 Fed. Reg. 1608 (Jan. 11, 2001) 7

DOE, *Storage and Disposition of Weapons-Usable Fissile Materials Final Programmatic Environmental Impact Statement* 1-1, 1-5, 1-6, 61 Fed. Reg. 67001 (Dec. 19, 1996) 6

NNSA/DOE, *Disposition of Surplus Plutonium at Savannah River Site* 4-24-27 (Feb. 15, 2002) (available at http://www.nci.org/pdf/doe-pu-2142002.pdf) 8

National Academy of Sciences, *Management and Disposition of Excess Weapons Pu: Reactor-Related Options* 417 (National Academy Press 1995) 6

National Defense Authorization Act of Fiscal Year 2002, Pub. L. No. 107-117, § 3155, 115 Stat. 1012, 1378 (2001) 1, 3, 20

Supplement Analysis for Storage of Surplus Plutonium in the KAMS Facility 3, D.O.E./E.I.S.-0229-SA2 (Feb. 2002) 8

Supplement Analysis for Storing Plutonium in the Actinide Packaging and Storage Facility and Building 105-K at the Savannah River Site 4 (July 1998) 7

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals is available at 300 F.3d 432 (4th Cir. 2002). The opinion of the District Court for the District Court of South Carolina at Aiken is not published yet. The Fourth Circuit opinion is reproduced in the Appendix to this petition (hereafter "App.") at page 1; the District Court is reproduced at App. 32.

JURISDICTION

The judgment of the Fourth Circuit was entered on August 6, 2002. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*; the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.*; and the National Defense Authorization Act of Fiscal Year 2002, Pub. L. No. 107-117 § 3155; 115 Stat. 1012, 1378 (2001) are reproduced at App. 90.

STATEMENT

1. Introduction

The United States has determined that it has more plutonium than it needs for national defense. The Department of Energy (DOE) was charged with deciding

what to do with this "surplus" plutonium. After thorough study, DOE decided to convert some of the surplus plutonium into fuel for nuclear power plants and to immobilize the rest in secure containers buried in a deep geologic repository. The Savannah River Site (SRS) in South Carolina was chosen as the site to process the plutonium. Any plutonium delivered to SRS was to be converted into a fuel for commercial nuclear power plants or immobilized for transfer to a geologic site. None was to remain at SRS. Congress ratified this approach by directing DOE to devise a plan for surplus plutonium that would provide for removal "in a timely manner" of all plutonium shipped to South Carolina. Almost right up to the moment when DOE issued the decision challenged here, DOE itself thought it appropriate to assure a pathway out of South Carolina for the plutonium to be shipped there. However, when the Governor of South Carolina refused to promise, as demanded by the Secretary of DOE, that he would not challenge DOE's decisions concerning plutonium at SRS, DOE announced that it was canceling the immobilization program, putting off indefinitely the conversion program, decoupling plutonium storage at SRS from plutonium processing, and sending surplus plutonium to South Carolina forthwith for long-term storage. The Fourth Circuit held that because it had found that DOE had complied with the National Environmental Policy Act in coming to its decision, the agency had perforce complied with the Administrative Procedure Act as well.

In combination, the Department's actions threaten to make the Savannah River Site in South Carolina the Yucca Mountain of the East, but without the benefit of the extensive environmental reviews that have attended the decisions concerning Yucca Mountain. Despite the

enormous implications of the lethality and longevity of plutonium for the human environment, despite the fact that the SRS facilities were not designed with long-term disposal of plutonium in mind, and despite the fact that the original purposes of shipping plutonium to and storing plutonium at SRS were no longer being actively pursued, DOE declined to perform an analysis of the environmental consequences of and alternatives to its decision to ship surplus plutonium to SRS and to store it there for the indefinite future. The Fourth Circuit held that DOE was not required to prepare any new NEPA documents regarding its change of policy because "it was apparent," based on DOE's explanation of its actions, "that the proposed change did not create a new environmental picture from that previously studied." App. 30.

2. Statutory and Regulatory Background

For decades, the federal government has assumed primary responsibility for the handling and disposal of nuclear materials. *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 194 (1983). Nevertheless, on issues relating to long-term disposal of radioactive waste, Congress has made room for the involvement of states in the selection of disposal sites. *New York v. United States*, 505 U.S. 144 (1992).

With respect to the plutonium at issue in this case, Congress specifically directed DOE to consult with the State of South Carolina in coming to its decisions on the management and disposal of surplus plutonium. National Defense Authorization Act of Fiscal Year 2002, Pub. L. No. 107-117, § 3155, 115 Stat. 1012, 1378 (2001). At the same

time, Congress also instructed DOE to develop a plan for disposition of surplus plutonium that would specify "the means by which all such defense plutonium and defense plutonium materials will be removed in a timely manner from the Savannah River Site for storage or disposal elsewhere." *Id.*

In making decisions about the handling and disposal of nuclear waste, DOE is also bound by NEPA and the APA. NEPA requires that an agency proposal on a major federal action significantly affecting the quality of the human environment be accompanied by a detailed statement of the environmental consequences of, and alternatives to, the proposed action. 42 U.S.C. § 4332(C). Regulations issued under the Act require that federal agencies prepare an environmental assessment for their actions unless they decide at the outset to prepare an environmental impact statement or there is a specific exclusion for the action in question. 10 C.F.R. § 1021.104, 1021.321(a), 1021.400(d) and 40 C.F.R. § 1508.9.

The prohibition on arbitrary or capricious agency action embodied in the APA, 5 U.S.C. § 706(2)(A), requires, among other things, that final agency action be based on "a consideration of the relevant factors," *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971), and on a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). Agency action will be deemed arbitrary where, for example, the agency "has relied on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs' Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The agency decisions at issue here arose out of the federal government's efforts to deal with the problem of surplus plutonium, plutonium that the United States has determined is no longer needed for purposes of national defense. Beginning in the 1990s, the United States and the Russian Federation together concluded that they no longer needed all of the nuclear weapons they had stockpiled during the Cold War. In 1994, the Presidents of the two nations agreed to the goals of "safe, secure, long-term storage and disposition of surplus fissile materials" and to "irreversible" reduction of these materials. Joint Statement Between the United States and Russia on Nonproliferation of Weapons of Mass Destruction and Means of their Delivery (January 14, 1994).

The United States has committed, both bilaterally and unilaterally, to reducing the "surplus" weapons in its nuclear stockpile. There are at least two different ways to accomplish this goal. One is the conversion of weapons-grade plutonium into material that is not usable in nuclear weapons. Plutonium would be combined with uranium to produce "mixed-oxide fuel" (MOX), which would be used at nuclear power plants to produce electricity. Another way to reduce the accessibility of weapons-grade plutonium is to immobilize it in secure containers and bury it in a deep geologic repository. As explained below, both of these strategies were included in DOE's policies for surplus plutonium until the reversal of course at issue in this case.

3. The Department of Energy's Decisions

a. Decisions Before April 2002

On January 21, 1997, the Department of Energy issued a Record of Decision (ROD) announcing a dual-track plan for plutonium disposition whereby pure forms of plutonium would be processed into MOX for use by commercial reactors and the remaining impure plutonium would be immobilized into a ceramic form and placed in a geologic site. DOE, *Record of Decision for the Storage and Disposition of Weapons-Usable Fissile Materials Final Programmatic Environmental Impact Statement*, 62 Fed. Reg. 3014 (Jan. 21, 1997). The National Academy of Sciences had recommended the dual approach in a 1995 report which states, "Since it is crucial that at least one of these options succeed, since time is of the essence, and since the costs of pursuing both in parallel are modest in relation to the security stakes, we recommend that project-oriented activities be initiated on both options, in parallel, at once." National Academy of Sciences, *Management and Disposition of Excess Weapons Pu: Reactor-Related Options* 417 (National Academy Press 1995). Furthermore, the United States wanted the immobilization technology to deal with certain plutonium in the military complex that it deemed unsuitable for use in nuclear reactors. *Id.*

The 1997 ROD had been preceded by a 1996 Programmatic Environmental Impact Statement (PEIS). The PEIS divided its subject into three categories: storage, storage pending disposition and disposition. DOE, *Storage and Disposition of Weapons-Usable Fissile Materials Final Programmatic Environmental Impact Statement*, 1: 1-5, 1-6, 61 Fed. Reg. 67001 (Dec. 19, 1996). DOE's "preferred alternative" designated only the nonsurplus plutonium and highly enriched uranium, not surplus plutonium, for

long-term storage. Under DOE's preferred approach, surplus plutonium was only to be stored "pending disposition" through conversion to MOX or immobilization. To be sure, DOE concluded that it was best to transfer surplus plutonium from the Rocky Flats nuclear facility in Colorado to SRS – but for the purpose of disposition, not simply to move the plutonium to a different place. In addition, the facilities at SRS were to be upgraded and expanded to accommodate this new burden.

Over the next several years, DOE made further refinements and adjustments to its policies for surplus plutonium. In 1998, DOE issued a supplement assessment in which it analyzed its proposal to ship surplus plutonium to SRS on an accelerated schedule and to store the plutonium in an existing building at SRS, called KAMS, pending completion of a new facility specifically designed to handle the surplus plutonium. *Supplement Analysis for Storing Plutonium in the Actinide Packaging and Storage Facility and Building 105-K at the Savannah River Site* 4 (July 1998). (In January 2001, DOE canceled its plans for the new facility.) In its 1998 supplement assessment, DOE specifically explained that the transfer of plutonium to SRS "would not occur unless DOE decides to immobilize plutonium at the SRS." *Id.* Subsequently, in a federal register notice of January 11, 2000, DOE issued a ROD deciding to locate the MOX and immobilization facilities for processing surplus plutonium at SRS. DOE, *Record of Decision on Final E.I.S. Summary*, 65 Fed. Reg. 1608 (Jan. 11, 2001). Both of these decisions kept the basic structure of the 1997 ROD intact: surplus plutonium would be shipped to SRS for the purpose of rendering the material less accessible to anyone – in the U.S. government or

elsewhere – who might wish in the future to use it for aggressive purposes.

In a February 2002 supplement analysis for storage of surplus plutonium at SRS, DOE noted that a 1998 supplement analysis on the subject had assumed storage of surplus plutonium would be "for up to 10 years," pending disposition. *Supplement Analysis for Storage of Surplus Plutonium in the KAMS Facility* 3, D.O.E./E.I.S.-0229-SA2 (Feb. 2002). The February 2002 supplement assessment stated that storage of surplus plutonium at SRS may extend beyond the 10 years previously estimated, but made it clear that the storage would not be long-term, noting, "DOE plans to disposition its surplus plutonium as soon as practical and believes storage in KAMS would be necessary for less than 20 years." *Id.* at 8. At this time, then, DOE's policy continued to be interim storage at SRS pending disposition.

On February 15, 2002, DOE submitted to Congress a report Congress had requested on the status of the surplus plutonium program. The report stated that the agency rejected the long-term storage approach. NNSA/DOE, *Disposition of Surplus Plutonium at Savannah River Site* 4-24-27 (Feb. 15, 2002) (available at http://www.nci.org/pdf/doe-pu-2142002.pdf). The report also announced that DOE would eliminate the immobilization component of the surplus plutonium program and proceed exclusively by way of the MOX technology. The report provided a detailed schedule for implementing the MOX processing – and eventually deactivating it – at SRS.

Two of the options considered in the report, but rejected, were storage of the surplus plutonium in the six places where it currently resides, and consolidated storage

in two. One of the disadvantages of the storage approach was said to be, "The U.S. plutonium disposition mission and parallel Russian disposition effort would not be achieved. Russian plutonium would remain subject to increasing risk of theft or diversion." *Id.* at 4-24. Another disadvantage of the storage approach was said to be, "While the technologies for storing plutonium currently in use throughout the complex are considered mature, there is no experience for very long-term storage of pits and non-pit plutonium." *Id.* Yet another disadvantage of the storage approach came under the category, "sensitivities." For the storage in place option, the report stated: "Both South Carolina and Colorado would strongly oppose this option." *Id.* As to "sensitivities" if there were consolidated storage, the report stated:

> South Carolina would view this option as a failure to provide a pathway out of SRS for surplus plutonium brought there for disposition (assuming that SRS was selected as one of the consolidation sites). Therefore, this option can be expected to be strongly opposed by the State of South Carolina and challenged in the courts. *This option would likely require additional NEPA review and public meetings.* [*Id.* at 4-26, emphasis added.]

As of February 2002, then, this is where things stood. DOE's formal policy remained the one first announced five years before. Surplus plutonium was to be either converted to fuel or immobilized and placed in a geologic repository. Pending this activity, surplus plutonium was to be shipped to SRS for interim storage. Transfer of plutonium to SRS and interim storage of it there were to occur for the purpose of disposition. DOE had, in its report to Congress, proposed that the immobilization program be

canceled, but at that time it did not issue a formal decision to undertake this proposal. In the report to Congress, moreover, DOE specifically rejected the idea of transferring plutonium to SRS independent of disposition. All this changed in April 2002.

b. DOE's Reversal of Course

Beginning in 2001, Governor Jim Hodges of South Carolina became concerned about DOE's plans for transfer of surplus plutonium to, and long-term storage of this plutonium at, SRS. He embarked upon a correspondence with the Secretary of DOE, Spencer Abraham, in which he stated his concerns about shipping plutonium to SRS and sought DOE's assurance that the agency would meet its commitment to process, then remove, the surplus plutonium sent to SRS and not use the state as a permanent disposal ground for plutonium. This correspondence culminated in an extraordinary letter from Secretary Abraham to Governor Hodges on April 11 of this year.

Along with that letter, Secretary Abraham sent a draft record of decision to Governor Hodges and an agreement, which he asked the Governor to sign, indicating his consent to the approach of the draft record of decision. The decision proposed by DOE committed the agency to ensuring a credible "exit strategy" for plutonium brought into South Carolina and provided specific dates by which DOE would remove the plutonium from the State if DOE's commitments had not been met. In signing the agreement proffered by Secretary Abraham, Governor Hodges would have been agreeing not to file any legal challenge against the Secretary's decisions concerning SRS and surplus plutonium.

In the April 11, 2002 letter itself, Secretary Abraham wrote:

> As I have indicated in our various personal meetings and phone conversations, I appreciate your concerns that any plutonium that comes into the State have a credible pathway out. That is why when we spoke on February 23, I personally assured you that our new approach would not transport any plutonium to South Carolina unless our plans for fabricating it into MOX fuel were progressing in a fashion that assured that it would be able to be disposed of through this process.

Letter from Secretary Abraham to Governor Hodges of 4/11/02, App. 103. Additionally, Secretary Abraham stated in the same letter that DOE had made a:

> commitment to maintain a pathway out of South Carolina for any plutonium brought into the State, including firm dates by which such material would be removed from the State if DOE, for any reason, were to be unable to secure the funding necessary to build the MOX facility.

Id., App. 104. Secretary Abraham coupled his offer of a pathway out of South Carolina with a warning about what would happen if Governor Hodges did not sign the agreement:

> I am prepared to authorize issuance of this Record of Decision immediately upon receiving a signed agreement from you. . . . If you are unable to accept this agreement, I will proceed to take the steps I believe necessary to meet our national security and environmental cleanup objectives. Consistent with applicable law, on April 15, I will authorize issuance of an amended Record of

> Decision that does not incorporate the terms of the attached agreement and will direct issuance of the requisite 30-day notice of our intent to begin shipping.

Id., App. 102 and 106-107. Thus Secretary Abraham threatened Governor Hodges that if he did not sign the agreement Abraham had profferred, none of the qualifications and contingencies provided for in the agreement and the draft record of decision would be recognized.

Governor Hodges, however, insisted that DOE make the agreement legally enforceable, and this DOE would not do. Thus DOE and Governor Hodges did not execute an agreement concerning the shipment of plutonium to SRS.

On April 19, 2002, DOE issued an amended ROD in final form. DOE, *Amended Record of Decision, Surplus Plutonium Disposition Program*, 67 Fed. Reg. 19432 (Apr. 19, 2002). It was dramatically different from the draft DOE had sent to Governor Hodges eight days earlier. The amended ROD announced the "immediate implementation of consolidated long-term storage at the Savannah River Site (SRS) of surplus non-pit plutonium now stored separately at the Rocky Flats Environmental Technology Site (RFETS) and SRS. . . ." *Id.* at 19432.

Whereas Secretary Abraham had guaranteed that the shipment of surplus plutonium to SRS was strictly tied with processing it there, the amended ROD stated:

> In addition to achieving the ultimate goal of permanent disposition of surplus plutonium materials, DOE *independently* needs to improve the configuration of the storage system for these materials pending disposition. These improvements

> will allow DOE to significantly reduce storage costs, expedite closure and cleanup of sites and facilities in its nuclear complex, and enhance the security of these materials. [*Id.* at 19433, emphasis added.]

Secretary Abraham had made good on his threat to Governor Hodges: because the Governor had refused to sign an agreement DOE conceded – indeed, insisted – was legally unenforceable, DOE withdrew all of the protections it had been prepared to provide to South Carolina to assure implementation of DOE's long-standing surplus plutonium disposition policy and replaced them with a decision making South Carolina the nation's only consolidated, long-term storage site for weapons-grade plutonium.

4. Proceedings Below

Shortly after DOE announced its new policy for surplus plutonium, Governor Hodges sued Secretary Abraham and DOE in federal district court in South Carolina, alleging that the agency had failed adequately to analyze the consequences of and alternatives to its decision under the National Environmental Policy Act (NEPA) and that its reversal of policy course was arbitrary and capricious under the Administrative Procedure Act (APA).

Governor Hodges' NEPA and APA claims reflected two very different lines of attack. His NEPA claims asserted that DOE had violated NEPA by failing to prepare either an environmental assessment (prepared in cases in which the need for an environmental impact statement is unclear) or a supplemental environmental impact statement in coming to its new decisions concerning surplus

plutonium. Complaint ¶¶ 71-84. In his APA claim, on the other hand, Governor Hodges contended that DOE's reversal of course on surplus plutonium in April 2002 was arbitrary and capricious, not because of DOE's treatment of environmental issues but because DOE's abrupt change of policy was itself arbitrary and capricious. Complaint ¶¶ 89-93.

The district court denied Governor Hodges' motion for a preliminary injunction against DOE's plutonium shipments into South Carolina and at the same time granted summary judgment in favor of DOE. In this decision, the district judge completely subsumed the APA claim within the NEPA claim; she asked only whether DOE's decisions concerning the development of NEPA documents were arbitrary and capricious, not whether the decision announced on April 19 was itself arbitrary and capricious. Finding no meritorious NEPA claim, the judge granted judgment for DOE without separate discussion of the APA.

The Fourth Circuit followed a similar path. After rejecting the Governor's NEPA claims, the appeals court rejected the APA claim as well:

> Governor Hodges also maintains that the DOE's decisionmaking process violated the Administrative Procedure Act (the "APA"). Under the APA, we must uphold an agency decision if it is supported by "substantial evidence," and is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), (E). In conducting our review under the APA, "we perform only the limited, albeit important, task of reviewing agency action to determine whether the agency conformed with controlling statutes, and whether the agency has committed a clear error of judgment." *Maryland*

> *Dep't of Human Res. v. United States Dep't of Agric.*, 976 F.2d 1462, 1475 (4th Cir. 1992) (internal quotations and citations omitted). *In view of the DOE's compliance with NEPA, the Governor's APA challenge is also without merit.*

Hodges v. Abraham, 300 F.3d 432, 449 n. 17 (4th Cir. 2002) (emphasis added). The Fourth Circuit's holding was no accident: the Department of Justice had, in its brief on appeal, argued on behalf of just this result, stating flatly that the Governor had "no independent APA cause of action in this case" and that "[t]he APA here is simply the means for effectuating judicial review under the NEPA statute, which creates a purely procedural statute." Brief for the Federal Appellees, *Hodges v. Abraham*, No. 02-1639 (4th Cir.), at 56-57.

In holding that compliance with NEPA excuses compliance with the APA, the Fourth Circuit parted company with the relevant statutory language, and with this Court's established precedents and those of other lower courts, on a matter of great importance to the State of South Carolina and to the nation as a whole.

On the NEPA issue, the Fourth Circuit determined that it was not necessary for DOE to prepare an environmental assessment for its new decision because DOE had decided that its previous environmental analyses covered its changed decision. On this point, too, the Fourth Circuit erred.

REASONS FOR GRANTING THE PETITION

1. The Department of Energy, perversely, treated its "consultation" with South Carolina, required by Congress

in the National Defense Authorization Act of FY2002, as an opportunity to dangle one approach to the problem of surplus plutonium before South Carolina's eyes and then to snatch that approach away when South Carolina failed to jump at it. By refusing to review Governor Hodges' claim that the Department's decision was arbitrary and capricious under the APA, merely because the court had found that the Department had complied with an entirely separate statute, NEPA, the Fourth Circuit gave its stamp of approval to the Department's petulant treatment of a sovereign State. The Fourth Circuit's legal error in conflating NEPA and the APA is plain; its decision conflicts with decisions of this Court and of other circuits; and it has ratified the Department of Energy's rush to judgment on a matter of great national importance. This Court should grant the Governor's petition for a writ of certiorari.

a. By its literal terms, NEPA disclaims any congressional intent to supplant other federal statutes. Other environmental standards, and requirements of coordination or consultation with, and recommendations or certification of, other Federal or State agencies, are explicitly preserved by the statute. 42 U.S.C. § 4334. In addition, NEPA provides that "[t]he policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies." 42 U.S.C. § 4335. Where the executive branch finds that existing regulatory programs are inadequate for the purposes of environmental protection, it is encouraged to make "recommendations for legislation" to fix the problem. 42 U.S.C. § 4341. These provisions together leave no doubt that NEPA supplements, but does not supplant, other statutory regimes.

Nothing in the statute remotely suggests that the APA is an exception to this rule. The Fourth Circuit's holding that compliance with NEPA implies compliance with the APA thus flouts the plain language of NEPA. Indeed, as explained next, not only does the statute itself give no hint whatsoever of an intent to repeal the APA in cases where NEPA implies, but this Court's decisions strongly confirm that NEPA and the APA are two different, independently applicable, statutes.

b. In a series of decisions handed down in the decade or so after NEPA was enacted, this Court made plain that the APA and NEPA create two different statutory regimes. In fact, it would not be an overstatement to say that the interaction between the APA and NEPA was *the* predominant question in the early NEPA cases heard by this Court. These cases resoundingly affirmed what is plain from the statutory text: NEPA did not amend or repeal the APA.

In its very first encounter with NEPA, this Court concluded that the statutory language "indicates that NEPA was not intended to repeal by implication any other statute." *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 694 (1973); see also *Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289, 319 (1975).

In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978), this Court unanimously rejected the argument that NEPA somehow enlarged the procedures otherwise required by the APA. "We search in vain," the Court said, "for something in NEPA which would mandate such a result. . . . Thus, it is clear NEPA cannot serve as the basis for a substantial

revision of the carefully constructed procedural specifications of the APA." *Id.* at 548.

Although Vermont Yankee is famous for its holding that NEPA did not *add to* the requirements of the APA, the case stands equally for the proposition that nothing in NEPA *subtracts from* APA requirements.[1] The Court concluded that the Atomic Energy Commission had satisfied NEPA's requirements, *id.* at 549-55, but remanded the case to the Court of Appeals to review the question whether the agency had violated the APA by issuing a decision unsupported by the administrative record. *Id.* at 549. Nowhere did the Court intimate that the agency's compliance with NEPA implied compliance with the APA, and its remand to the appeals court for further review under the APA signals just the opposite conclusion.

This Court's other leading NEPA cases reaffirm this result. In the per curiam opinion in *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980), the Court summarily reversed a Second Circuit decision requiring a federal agency to give "determinative weight" to environmental considerations pursuant to NEPA. *Id.* at 227. The Court also hinted, however, that it might have reached a different result – and certainly would have granted plenary review – if it had thought that the agency had acted "arbitrarily or capriciously." *Id.* at 228 n. 2. Because the court below had not found this to be the case, the Court rested with its NEPA analysis. The decision

---

[1] Similarly, in *Bennett v. Spear*, 520 U.S. 154, 175 (1997), this Court held that the Endangered Species Act does not supplant APA requirements.

plainly recognizes, as *Vermont Yankee* did, that federal agencies' compliance with NEPA does not excuse compliance with the APA's constraints on arbitrary agency action.

In short, the Fourth Circuit departed from this Court's long- and clearly established precedents by ending its analysis with NEPA and refusing to go on to consider whether the Department of Energy had violated the APA. Perhaps even more surprising than the Fourth Circuit's erroneous decision is the fact that the United States asked for it: in responding to Governor Hodges' APA claim in its appellate brief, the Department of Justice asked the court to reject the Governor's attempt to "smuggle" arbitrary and capricious review into NEPA, and stated flatly that the Governor had "no independent APA cause of action in this case. The APA here is simply the means for effectuating judicial review under the NEPA statute, which creates a purely procedural statute." Brief for the Federal Appellees, *Hodges v. Abraham*, No. 02-1639 (4th Cir.), at 56-57. The Department of Justice is thus as confused as the Fourth Circuit is. NEPA simply does not supplant the APA. Even if a federal agency complies with NEPA, it must still comply with the APA by issuing decisions that are neither arbitrary nor capricious.

NEPA and the APA are, to be sure, linked in the following way: the APA provides the statutory basis and standard of review for judicial review of agency analysis undertaken pursuant to NEPA. But agency action that complies with NEPA can nevertheless violate the APA by being arbitrary and capricious, where the agency operates under legal constraints that arise outside NEPA. Here, the authority under which DOE set surplus plutonium policy – including nonproliferation agreements and the National

Defense Authorization Act of Fiscal Year 2002, Pub. L. No. 107-117, § 3155, 115 Stat. 1012, 1378 (2001) – nowhere made South Carolina's disagreement with federal plutonium policy a relevant consideration in setting that policy. Indeed, the National Defense Authorization Act of Fiscal Year 2002 specifically required DOE to consult with South Carolina and to describe its plans for an exit strategy for the plutonium sent to SRS for disposition. Nevertheless, Governor Hodges' simple disagreement with Secretary Abraham figured profoundly in Secretary Abraham's April 2002 decisions concerning surplus plutonium. By relying on a consideration that the laws under which he operated deemed irrelevant, Secretary Abraham acted arbitrarily and capriciously according to this Court's well-settled jurisprudence of administrative law.

c. The Fourth Circuit's decision also parted company with decisions from other federal circuits. The court's error lay not in applying an APA standard of review to the NEPA claims in this case, but in concluding that the APA spoke *only* to the NEPA claims raised here and not to the issue of whether DOE had acted arbitrarily within the meaning of *other* relevant laws. The notion that the APA might constrain agency action outside the context of NEPA, even in settings where NEPA also applies, is so well accepted in other circuits that it is hard to find explicit statements to this effect. Plenty of evidence exists, however, to conclude that the Fourth Circuit's ruling on this issue is out of line with precedents from other lower federal courts.

Particularly telling in this regard are the many cases from other courts confronting claims based on multiple statutes governing natural resources. In numerous cases concerning conflicts regarding natural resources, one finds

plaintiffs invoking not only NEPA, but also the Endangered Species Act, the National Forest Management Act, and others. Claims under these latter statutes typically invoke the APA, and courts other than the Fourth Circuit have consistently heard *both* the claims under NEPA and the claims asserting violations of the APA through actions under other statutes. *See, e.g., Native Ecosystems Council v. Dombeck*, 2002 U.S. App. LEXIS 18845 (9th Cir. Sept. 17, 2002) (reviewing separately claims arising under NEPA, National Forest Management Act, and Endangered Species Act); *Environmental Defense Fund, Inc. v. U.S. Environmental Protection Agency,* 485 F.2d 780 (D.C. Cir. 1973) (holding that NEPA claims, and APA claims arising out of agency's actions under Federal Insecticide, Fungicide and Rodenticide Act, must be heard in D.C. Circuit); *Sierra Club v. U.S. Army Corps of Engineers*, 701 F.2d 1011 (2d Cir. 1983) (finding violations of NEPA and of APA through actions under Clean Water Act). Other courts have not held, as the Fourth Circuit did, that NEPA compliance necessarily implies APA compliance.

In sum, the lower federal courts routinely consider legal claims under the APA even where NEPA also applies. The Fourth Circuit's square holding that compliance with NEPA perforce implies compliance with the APA is a clear departure from the approach of other circuits.

d. Few issues in the modern era have so challenged the delicate balance between the States and the federal government as has the disposal of the dangerous and persistent byproducts of the nuclear age. This Court has insisted upon respectful treatment of the states by the federal government even where the "pressing national problem" of radioactive waste disposal is concerned, *New*

York v. United States, 505 U.S. 144, 187 (1992), and it has worked to preserve state authority wherever it can. *See Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190 (1983) (upholding California's refusal, on economic grounds, to license new nuclear power plants in the absence of a solution to the problem of nuclear waste).

This case, unhappily, reflects shockingly cavalier treatment of a State by the federal government. Because Governor Hodges would not sign the agreement proffered to him by the Department of Energy, the Department turned around and reversed course on an issue of great national importance. Whereas in February of this year the Department reported to Congress that long-term storage independent of disposition was unacceptable, and whereas the Department was willing as of April 11 of this year to condition transfer of plutonium to South Carolina on the disposition of that plutonium and its removal from South Carolina upon disposition, by April 19 the Department had completely disconnected disposition from transfer of plutonium to, and storage of plutonium in, South Carolina, and had removed any assurances it had previously thought sensible concerning an "exit strategy" for the plutonium brought to South Carolina. All this because the Governor had not acceded to the Department's demand for his signature on what the Department conceded was not a legally enforceable agreement. Nothing in the nonproliferation agreements upon which the Department's work initially built, nor in the National Defense Authorization Act of Fiscal Year 2002, which refined the Department's instructions concerning surplus plutonium, makes the Governor's disinclination to sign the agreement proffered to him by Secretary Abraham a relevant consideration in

the development of the nation's policies concerning surplus defense plutonium.

Indeed, it would hardly suit the system of "dual sovereignty" established by the Constitution, see *Federal Maritime Commission v. South Carolina State Ports Authority*, 122 S.Ct. 1864, 1870 (2002), nor would it respect the principle that "States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government," *id.*, but instead " 'entered the Union 'with their sovereignty intact,' " *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991), to conclude that DOE may, without fear of legal reprisal, retaliate against a State for its expression of disapproval of federal policy by fundamentally reworking the structure of that policy in a way that disadvantages the State in question.

The Administrative Procedure Act was designed to prevent just the kind of arbitrary and capricious action DOE exhibited here. It is no less arbitrary or capricious to consider factors not relevant to the agency's mission – such as the honest disagreement of the Governor of a sovereign State with a proposed federal policy – than it is to fail to consider factors that are relevant to the agency's mission. *Overton Park*, *supra*, 401 U.S. at 416. The Fourth Circuit erred in refusing even to address the question whether the Department's high-handed and disproportionate reaction to Governor Hodges' qualms about the long-term storage of plutonium in his State was arbitrary and capricious within the meaning of the APA.

2. The Fourth Circuit's error in finding that compliance with NEPA implies compliance with the APA was compounded by the fact that its finding regarding NEPA compliance was also erroneous. This part of the court's

decision is also out of step with this Court's precedents, and the Fourth Circuit's clear legal error ratified DOE's unreflective reversal of course on a matter of such great national importance that the Court should grant review of this question as well.

a. The Fourth Circuit found that DOE had complied with NEPA based on DOE's representation that documents prepared prior to its April 2002 decision adequately demonstrated that its April 2002 reversal of course would not cause significant environmental consequences, triggering new NEPA obligations.

This Court has made clear that federal agencies have a continuing obligation to analyze the environmental consequences of, and alternatives to, their major proposals. By focusing agency attention on the environmental consequences of agency action, "NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989). "It would be incongruous with this approach to environmental protection, and with the Act's manifest concern with preventing uninformed action," the Court has observed, "for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval." *Id.* Thus, the mere fact that DOE had previously prepared NEPA reports on its surplus plutonium program did not excuse it from preparing new reports when the agency profoundly altered its policy course.

b. In April of this year, DOE changed its policy regarding surplus plutonium in two very large ways: First,

it decided that transfer of surplus plutonium to, and long-term storage of this plutonium at, SRS would no longer be dependent on disposition of this plutonium. The plutonium could, in other words, stay at SRS indefinitely – indeed, forever – without doing violence to DOE's new policy. Second, DOE canceled the immobilization portion of its plutonium program and decided to rely exclusively on MOX processing for disposition. Both of these abrupt policy changes had significant potential consequences for the environment, and yet neither has been evaluated under NEPA by DOE.

Starting with the decision to disconnect storage at SRS from disposition, this choice makes SRS the nation's only indefinitely long-term storage site for surplus plutonium. Much ink has been spilled in this case over whether DOE evaluated storage of plutonium at SRS for 10, 20, or 50 years, with the Fourth Circuit concluding (erroneously, in our view) that DOE had adequately considered the environmental consequences of plutonium storage at SRS for up to 50 years. But this fine parsing of the relevant temporal period misses the larger and more important point: nothing in DOE's April 2002 Record of Decision makes 50 years the outer limit for storage of surplus plutonium at SRS. Plutonium could be stored at SRS until kingdom come and the April 2002 decision would have nothing to say about it.

If DOE had come to this decision right off the bat, in its 1997 Record of Decision which started this whole process, there is no doubt that it would have been required to prepare an EIS. DOE's own NEPA regulations deem the storage of high-level nuclear waste to be "categorically included" within NEPA's EIS requirements; that is, an EIS is normally required for this category of decisions. 10

C.F.R. § 1021.400 (Subpart D, Appendix D-10). To allow DOE, as the Fourth Circuit did, to make this same decision without an EIS merely because the agency had analyzed *other* decisions in previous EIS's is nonsensical.

Turning to DOE's reversal of course on immobilization, DOE itself in April 2002 recognized that it would need to conduct further NEPA review of the consequences of canceling immobilization, insofar as this decision necessitates the processing of more impure plutonium through the MOX facility. DOE, *Amended Record of Decision, Surplus Plutonium Disposition Program*, 67 Fed. Reg. 19435 (April 19, 2002). DOE cannot make a decision first and then analyze its environmental consequences later. In ratifying DOE's decision to do just this, the Fourth Circuit once again parted company with other circuits. *See Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000) (requiring federal agencies to consider environmental consequences of allowing Makah Indian Tribe to hunt whales *before* coming to its decision on whale hunting); *Sierra Club v. Marsh*, 872 F.2d 497 (1st Cir. 1989) (Breyer, J.) (in explaining that NEPA documents must be prepared before decision on agency action is made, the court observes: "[g]iven the realities, the farther along the initially chosen path the agency has trod, the more likely it becomes that any later effort to bring about a new choice, simply by asking the agency administrator to read some new document, will prove an exercise in futility").

c. The decision to make SRS the nation's consolidated long-term storage facility for surplus plutonium is too important a decision to be made without at least an environmental assessment. The Defense Nuclear Facilities Safety Board, an independent organization established by Congress to provide oversight of DOE, has raised

questions whether the KAMS facility at SRS where the storage will take place is capable of accomplishing this mission. In a letter of November 21, 2001, the Defense Nuclear Facilities Safety Board stated the KAMS facility "is an aged facility and was never intended to provide more than interim storage." App. 117. Similarly, in a report of February, 2002, it stated, " . . . KAMS is an aged facility with no confinement features for potentially extended storage of plutonium." App. 122. Before South Carolina indeed becomes the Yucca Mountain of the East, DOE should be required to analyze the environmental consequences of its new policy and to explore alternative, safer arrangements for plutonium storage at SRS.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WILLIAM L. WANT
171 Church St., Suite 300
Charleston, SC 29401
(843) 723-5148

STEPHEN P. BATES
Chief Legal Counsel
Office of the Governor
P.O. Box 11829
Columbia, SC 29211
(803) 734-6313

LISA HEINZERLING
Counsel of Record
Georgetown University
Law Center
600 New Jersey Ave., NW
Washington, DC 20001
(202) 662-9115

September 2002

HODGES V. ABRAHAM
APPENDIX FOR CERT PETITION

1. 4th Circuit Opinion ..... App. 1
2. South Carolina District Court Opinion ..... App. 32
3. Statutes and Regulations Involved ..... App. 90
4. Letter of April 11, 2002 from Secretary of Energy Spencer Abraham to Governor Jim Hodges of South Carolina ..... App. 101
5. Proposed Agreement (Attachment to April 11, 2002 letter) ..... App. 107
6. Letter of November 21, 2001 from Defense Nuclear Facilities Safety Board to Secretary of Energy Abraham ..... App. 115
7. Excerpt from Twelfth Annual Report to Congress, Defense Nuclear Facilities Safety Board (Feb. 2002) ..... App. 121

300 F.3d 432 (4th Cir. 2002)

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 02-1639

JIM HODGES, Governor of the State of South Carolina, in his official capacity,

Plaintiff-Appellant,

versus

SPENCER ABRAHAM, Secretary of the Department of Energy, in his official capacity; UNITED STATES DEPARTMENT OF ENERGY,

Defendants-Appellees,

and

MEDIA GENERAL OPERATIONS, INCORPORATED, d/b/a Morning News (Florence), WBTW, WSPA, WCBD and WJBF; Aiken Communications, Incorporated, d/b/a The Standard (Aiken); OSTEEN PUBLISHING COMPANY, INCORPORATED, d/b/a The Item (Sumter); EAST COAST NEWSPAPERS, INCORPORATED, d/b/a Island Packet, d/b/a The Herald (Rock Hill), d/b/a The Beaufort Gazette; THE EVENING POST PUBLISHING COMPANY, d/b/a The Post and Courier (Charleston); COLUMBIA NEWSPAPERS, INCORPORATED, d/b/a The State (Columbia); THE SUN PUBLISHING COMPANY, INCORPORATED, d/b/a Sun News; THE NEW YORK TIMES COMPANY, d/b/a The Herald-Journal (Spartanburg); INDEPENDENT PUBLISHING COMPANY, INCORPORATED, d/b/a Anderson Independent-Mail; LANDMARK COMMUNITY NEWSPAPERS OF SOUTH

CAROLINA, d/b/a The Lancaster News; JEFFERSON-PILOT COMMUNICATIONS COMPANY, d/b/a WCSC; PACIFIC AND SOUTHERN COMPANY, INCORPORATED, d/b/a WLTX; THE SOUTH CAROLINA PRESS ASSOCIATION; SOUTH CAROLINA BROADCASTERS; ASSOCIATED PRESS; LEE ENTERPRISES, INCORPORATED, d/b/a The Times and Democrat,

Parties in Interest,

and

David R. Black, individually and on behalf of a class of Citizens of the State of South Carolina; David G. Cannon, individually and on behalf of a class of citizens of the State of South Carolina; Hugh Carl Gooding, individually and on behalf of a class of citizens of the State of South Carolina; Edward Lemon, individually and on behalf of a class of citizens of the State of South Carolina,

Movants.

ENVIRONMENTALISTS, INCORPORATED,

Amicus Curiae.

Appeal from the United States District Court for the District of South Carolina, at Aiken. Cameron McGowan Currie, District Judge. (CA-02-1426-1-22)

Argued July 10, 2002 Decided Aug. 6, 2002

ARGUED: *William LeRoy Want*, Charleston, South Carolina, for Appellant. Jeffrey Bossert Clark, Deputy Assistant Attorney General, Environment and Natural Resources Division, United States Department of Justice, Washington, D.C., for Appellees. **ON BRIEF**: *Stephen P. Bates*, Office of the Governor, Columbia, South Carolina, for Appellant. Thomas L. Sansonetti, Assistant Attorney

General, Gregory D. Page, Lisa E. Jones, Environment and Natural Resources Division, United States Department of Justice, Washington, D.C.; J. Strom Thurmond, Jr., United States Attorney, *Robert F. Daley, Jr.*, Assistant United States Attorney, *Christie Newman Barrett*, Assistant United States Attorney, Columbia, South Carolina; Lee L. Otis, General, Marc Johnston, Office of General, Department Of Energy, Washington, D.C., for Appellees. Ruth Thomas, Pro Se, for Amicus Curiae.

Affirmed by published opinion. Judge *KING* wrote the opinion, in which Judge *WIDENER* and Judge *NIEMEYER* joined.

KING, Circuit Judge.

Jim Hodges, the Governor of South Carolina, has appealed the June 13, 2002, Order of the district court, which awarded summary judgment to the United States Department of Energy and its Secretary, Spencer Abraham (collectively, the "DOE"). Governor Hodges contends that the DOE has failed to comply with the National Environmental Policy Act ("NEPA") in connection with its transfer of surplus plutonium from Colorado to South Carolina. In response, the DOE maintains that Governor Hodges lacks standing to pursue this case and that, in any event, it has complied with the mandate of NEPA. As explained below, we conclude that, although the Governor possesses standing to maintain this action, NEPA has not been contravened. We therefore affirm.

I.

In 1995, the DOE began to consider the issues of whether and how to close its Rocky Flats Environmental

Technology Site near Denver, Colorado ("Rocky Flats"). In order to carry out such a closing, the DOE must transfer the plutonium at Rocky Flats to other DOE sites for storage and eventual disposition.[1] As such, the DOE considered utilizing its Savannah River Site (the "SRS"), located near Aiken, South Carolina, for the storage and disposition of the Rocky Flats plutonium. It prepared various NEPA compliance documents and materials analyzing and explaining the potential use of SRS for these purposes. After nearly seven years of study, the DOE announced, in its April 19, 2002, Amended Record of Decision (the "April 19 ROD"), that six metric tons[2] of surplus plutonium will be transferred from Rocky Flats to SRS for long-term storage.

On May 1, 2002, Governor Hodges initiated this lawsuit, seeking to enjoin the DOE from shipping the Rocky Flats plutonium into the Palmetto State. He maintained that the DOE violated NEPA in failing to properly consider the environmental consequences of its April 19 ROD, and that it had failed to comply with NEPA procedures prior to issuance of the ROD. On cross-motions for summary judgment, the district court rejected the positions of Governor Hodges in their entirety, and it declined

---

[1] Plutonium is a highly radioactive, metallic element that exists in approximately fifteen different variations. The explosive triggers (i.e., pits) at the core of modern nuclear weapons are largely composed (at least 93%) of a particular type of plutonium – Plutonium 239. In discussing this "weapons-grade" plutonium, we refer to it simply as plutonium.

[2] A metric ton weighs approximately 2,204.6 pounds.

to award injunctive relief against the DOE.[3] *Hodges v. Abraham,* CA No. 1:02-1426-22, Memorandum Opinion and Order, (D.S.C. June 17, 2002) (the "Opinion").[4] On appeal, the DOE contends, for the first time, that Governor Hodges lacks standing to pursue his claims in this case. Before analyzing the standing question (which implicates our jurisdiction in this proceeding) and the merits of Governor Hodges's appeal, we will review the pertinent facts and legal principles governing the NEPA issues presented.[5]

II.

A.

The events giving rise to this dispute began over fifty years ago, with the advent of nuclear technology and

---

[3] After being unsuccessful in district court, Governor Hodges sought an injunction pending appeal and a stay pending appeal from that court. When these requests were denied, the Governor sought an injunction pending appeal in this Court. By Order of June 20, 2002, we denied the Governor's request for such an injunction. However, we expedited his appeal and heard oral argument in Abingdon, Virginia, on July 10, 2002.

[4] Acknowledging the urgency of this proceeding, the district court rendered its decision orally from the bench on June 13, 2002, advising that it would file a written decision shortly thereafter. The court filed its Opinion on June 17, 2002.

[5] Certain national and local media were Parties in Interest in the district court, in connection with an effort by the DOE to seal certain parts of its administrative record. On June 14, 2002, the district court granted in part the DOE's request to seal. That ruling is not at issue in this appeal. In addition, several citizens of South Carolina sought to intervene in the district court on behalf of themselves and other residents of South Carolina. The court denied their motion on June 4, 2002, and that ruling is also not before us.

nuclear weapons. During the Cold War – from the late 1940s to the late 1980s – the United States and the Soviet Union engaged in a nuclear arms race, and they produced thousands of nuclear weapons powered by tons of plutonium. Following the demise of the Soviet Union and the end of the Cold War, our country and the post-Soviet government of Russia acted both bilaterally and unilaterally to reduce their nuclear weapons stockpiles. In January 1994, they issued a *Joint Statement Between the United States and Russia on NonProliferation of Weapons of Mass Destruction and Means of their Delivery,* which established the mutual goal of "safe, secure, long-term storage and disposition of surplus fissile materials." In order to demonstrate our nation's commitment to this goal, President Clinton, on March 1, 1995, unilaterally announced that a total of 38.2 metric tons of our plutonium was no longer necessary for defense purposes, and that it therefore constituted "surplus plutonium."[6] In September 2000, the United States and Russia formally pledged in writing that each would dispose of thirty-four metric tons of surplus plutonium. *Agreement Between the Government of the United States of America and the Government of the Russian Federation Concerning the Management and Disposition of Plutonium Designated as No Longer Required for Defense Purposes and Related Cooperation.* Pursuant to this Agreement, each country committed to

[6] The use of the terms "surplus" and "non-surplus" in referring to plutonium have no technical or scientific significance. Surplus plutonium is that which our Government has determined to be unnecessary for the national defense, while non-surplus plutonium remains essential.

"seek to begin operation of facilities [to dispose of the surplus plutonium] . . . not later than December 31, 2007."

B.

In this country, the responsibility for monitoring, storing, and disposing of nuclear materials, including plutonium, necessarily rests with the federal Government, specifically the DOE. 42 U.S.C. §§ 7112(10), 7133(a)(8). Since the President's 1995 pledge, the DOE has studied and explored several options aimed at determining the most effective way to fulfill its responsibility to store and dispose of our nation's surplus plutonium. Throughout this effort, the DOE has been subject to the requirements of NEPA, a statute enacted in 1969 to ensure that environmental concerns play a role in government decisionmaking.

1.

NEPA establishes "a national policy of protecting and promoting environmental quality." *Hughes River Watershed Conservancy v. Glickman,* 81 F.3d 437, 443 (4th Cir.1996). Although NEPA does not place substantive requirements on federal agencies, it requires them to follow certain procedures prior to undertaking any "proposed action," "proposal," or "project" that may affect the environment. *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 350, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989). Once the proper NEPA procedures are completed, i.e., "the adverse environmental effects of the proposed action are adequately identified and evaluated," a federal agency is entitled to "decid[e] that other values outweigh the environmental costs." *Id.* As the Supreme Court has observed,

"NEPA merely prohibits uninformed – rather than unwise – agency action." *Id.* at 351, 109 S.Ct. 1835.

The purpose of NEPA is two-fold. First, it ensures that an "agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Id.* at 349, 109 S.Ct. 1835. In other words, NEPA guarantees that an agency will take "a 'hard look' at environmental consequences" before making a decision that may affect the environment. *Id.* at 350, 109 S.Ct. 1835 (quoting *Kleppe v. Sierra Club,* 427 U.S. 390, 410 n. 21, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976)). Second, compliance with NEPA procedures "ensures that relevant information about a proposed project will be made available to members of the public so that they may play a role in both the decision-making process and the implementation of the decision." *Hughes River,* 81 F.3d at 443.

Pursuant to Section 102 of NEPA, a federal agency must prepare an environmental impact statement ("EIS") for every "recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). The Council on Environmental Quality ("CEQ"), a governmental body created by NEPA for the purpose of advising the President on environmental matters, has promulgated extensive regulations to aid federal agencies in determining whether a proposed action might significantly affect the quality of the human environment. 40 C.F.R. § 1500.3 (providing that CEQ guidelines are binding on all federal agencies); 10 C.F.R. §§ 1021.100-103 (incorporating CEQ

guidelines into DOE regulations).[7] In determining whether an environmental impact is significant, the CEQ regulations require agencies to consider both the "context" and the "intensity" of the potential impact of a proposed action, with the former focusing on the affected geographical region and its interests, and the latter looking to the severity of the proposal's environmental impact. 40 C.F.R. § 1508.27. If, in the circumstances, it is unclear whether an EIS is necessary, the agency is obliged to complete what is known as an environmental assessment ("EA"), which is a "concise public document" reviewing and analyzing whether an EIS is required. 40 C.F.R. § 1508.9.

A federal agency's responsibilities under NEPA do not end with the preparation of an EIS. If an agency's plans change, or if the circumstances surrounding a project are altered, NEPA obligations may be triggered. As the Supreme Court has observed, "[i]t would be incongruous with [NEPA's] approach to environmental protection . . . for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to completion of agency action simply because the relevant proposal has received initial approval." *Marsh v. Oregon Natural Res. Council,* 490 U.S. 360, 371, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989). The CEQ regulations mandate that a federal agency prepare a supplemental environmental impact statement ("SEIS") if "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns," or if

---

[7] The CEQ requires each federal agency to adopt its own procedures for implementing NEPA requirements. 40 C.F.R. § 1507.3. The CEQ's NEPA regulations are found at 40 C.F.R., pts. 1500-08, while the DOE's regulations implementing NEPA are found at 10 C.F.R., pt. 1021.

"[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1). In addition, the DOE's regulations for the implementation of NEPA provide that it "shall prepare [an SEIS] if there are substantial changes to [a] proposal or significant new circumstances or information relevant to environmental concerns." 10 C.F.R. § 1021.314(a). If it is unclear whether an SEIS is required in connection with one of its projects, the DOE is obliged to prepare what is called a supplement analysis ("SA"). 10 C.F.R. § 1021.314(c). Under the DOE's regulations, an SA must contain sufficient information for the DOE to determine (1) whether an existing EIS should be supplemented, (2) whether a new EIS should be prepared, or (3) whether no further NEPA documentation is necessary. 10 C.F.R. § 1021.314(c)(2). In sum, NEPA requires the DOE, before undertaking a proposed action or altering an existing one, to examine the environmental consequences thereof.[8]

2.

In the wake of the President's 1995 pledge that the United States would dispose of 38.2 metric tons of surplus plutonium, the DOE began exploring its options with respect to the storage and disposition of the surplus plutonium at Rocky Flats. The DOE's continuing effort to

[8] Under its regulations, DOE is not required to study the environmental effects of a proposed action when that action fits a categorical exclusion, i.e., an activity that the DOE has already determined to be environmentally inconsequential. 10 C.F.R. § 1021.410.

comply with NEPA included the following statements, analyses, and records of decision:

- in December 1996, the *Storage and Disposition of Weapons-Usable Fissile Materials Final Programmatic Environmental Impact Statement* (the "1996 PEIS")[9];

- in July 1998, the *Supplement Analysis for Storing Plutonium in the Actinide Packaging and Storage Facility and Building 105-K at the Savannah River Site* (the "1998 SA");

- in November 1999, the *Surplus Plutonium Disposition Final Environmental Impact Statement* (the "November 1999 EIS");

- in January 2000, the *Record of Decision for the Surplus Plutonium Disposition Final Environmental Impact Statement* (the "2000 ROD");

- in January 2001, the *Amended Record of Decision* (the "2001 ROD");

- in February 2002, the *Supplement Analysis for Storage of Surplus Plutonium Materials in the K-Area Material Storage Facility at the Savannah River Site* (the "2002 SA");

- in April 2002, the *Amended Record of Decision* (the April 19 ROD).

We now turn to the contents and conclusions of these NEPA materials.

---

[9] A programmatic environmental impact statement is a "broad-scope EIS . . . that identifies and assesses the environmental impacts of a DOE program." 10 C.F.R. § 1021.104(b).

a.

In December 1996, the DOE issued its 1996 PEIS, which studied various alternatives for the storage and disposition of this country's surplus and non-surplus plutonium. One of the goals of the 1996 PEIS was the reduction of the number of sites utilized by the DOE as federal storage facilities for plutonium. Toward that end, the 1996 PEIS proposed closing Rocky Flats and transferring its plutonium to other DOE sites. The DOE's preferred alternative contemplated, inter alia, the possibility of building three new facilities at SRS and the prompt transfer of some of the Rocky Flats plutonium to the new SRS facilities. The additional SRS facilities contemplated by the 1996 PEIS were:

> (1) A plutonium storage facility known as the Actinide Packaging and Storage Facility ("APSF"). The decision to build APSF had actually been made in 1995, and its original purpose was to stabilize, package, and store materials already located at SRS. 60 Fed.Reg. 65,800 (Dec. 12, 1995). The 1996 PEIS, however, proposed modifying the construction plans for APSF to allow for the receipt of plutonium from Rocky Flats.
>
> (2) A facility that could dispose of surplus plutonium through "immobilization." The process of immobilization calls for surplus plutonium to be placed "in glass or ceramic material for disposal in a geologic repository pursuant to the Nuclear Waste Policy Act." 62 Fed.Reg. 3014 (Jan. 21, 1997). In 1996, SRS already had waste-processing facilities that could be dedicated to immobilization, but the 1996 PEIS contemplated modifying those facilities or constructing new

ones to handle the immobilization of some of the nation's surplus plutonium.

(3) A facility to convert surplus plutonium into mixed oxide fuel ("MOX Fuel"). The 1996 PEIS proposed utilizing a MOX Fuel disposition strategy in conjunction with immobilization, by which surplus plutonium would be mixed with uranium dioxide and burned "in existing[ ] domestic, commercial reactors, with subsequent disposal of the spent fuel in a geologic repository pursuant to the Nuclear Waste Policy Act." 62 Fed.Reg. 3014 (Jan. 21, 1997). As with immobilization, the 1996 PEIS did not rule out simply modifying existing buildings at SRS to create the MOX Fuel fabrication facility.

Although the preferred alternative of the 1996 PEIS addressed only the short-term storage of surplus plutonium at SRS pending its disposition, the 1996 PEIS also studied other options. One such proposal was to upgrade the contemplated APSF to handle the long-term storage of surplus plutonium from several DOE sites, including Rocky Flats, for up to fifty years pending its disposition.

b.

In July 1998, the DOE prepared the 1998 SA, announcing that it could save the Government approximately $1.3 billion by closing Rocky Flats in 2006, four years earlier than had been previously contemplated. Prior to closing Rocky Flats, however, it was necessary for the DOE to transfer all of that facility's plutonium to other DOE sites. This planned plutonium transfer was complicated by the fact that the APSF, which was to serve as the SRS storage facility for the plutonium from Rocky Flats,

was not scheduled to be completed by the time such plutonium shipments were to commence. The 1998 SA consequently analyzed whether an existing building at SRS – Building 105-K, also known as KAMS ("SRS-KAMS") – could be expanded and modified for interim storage of the Rocky Flats plutonium for a period of up to ten years. The 1998 SA concluded that there would be no environmentally significant difference in storing the Rocky Flats plutonium at SRS-KAMS for up to ten years, rather than (as the 1996 PEIS had contemplated) at APSF. Thus, in the 1998 SA, the DOE concluded that no further NEPA study or documentation was necessary with respect to the temporary storage of the Rocky Flats plutonium at SRS-KAMS.

c.

In its November 1999 EIS, the DOE took the next step in the NEPA process leading to the present controversy, by examining how to dispose of up to fifty metric tons of plutonium.[10] Specifically, the November 1999 EIS analyzed the utilization of a "hybrid approach" to surplus plutonium disposition, whereby thirty-three metric tons of plutonium would be converted into MOX fuel and seventeen metric tons would be immobilized. Thereafter, on January 11,

[10] The November 1999 EIS stated that this fifty metric tons included "[the] 38.2 [metric tons] of weapons-grade plutonium already declared by the President as excess to national security needs, . . . weapons-grade plutonium that may be declared surplus in the future, as well as weapons-usable, reactor-grade plutonium that is surplus to the programmatic and national defense needs of DOE." The six metric tons from Rocky Flats, which is at issue in this proceeding, was included in the fifty metric tons referred to in the November 1999 EIS.

2000, the DOE issued its 2000 ROD, announcing that it intended to pursue the hybrid disposition approach studied in the November 1999 EIS. 65 Fed.Reg. 1608 (Jan. 11, 2000). Pursuant thereto, SRS was designated as the site for both the immobilization facility and the MOX Fuel facility. The 2000 ROD provided, however, that "[t]he construction of new facilities for the disposition of surplus U.S. plutonium would not take place unless there is significant progress on plans for plutonium disposition in Russia." *Id.* at 1620.

d.

In January 2001, the DOE again altered its plans. In the 2001 ROD, it abandoned its plan to construct the APSF at SRS, and it instead decided to modify an existing building at SRS for the interim storage of surplus plutonium, pending its disposition. 66 Fed.Reg. 7888 (Jan. 26, 2001). As we have noted, the DOE, in its 1998 SA, had contemplated storage of the Rocky Flats plutonium at the SRS-KAMS facility for up to ten years. With the cancellation of the APSF project, however, the DOE recognized that it might be necessary to store surplus plutonium in the SRS-KAMS facility for a longer period of time, and it then proceeded to assess the feasability of long-term plutonium storage at SRS-KAMS. As a result, the DOE issued the 2002 SA. The DOE therein examined whether the long-term storage of plutonium at SRS-KAMS created any new environmental impacts not previously considered in the 1996 PEIS and the 1998 SA, and it determined that none existed. The DOE therefore concluded that the "safe storage of surplus plutonium in KAMS can continue beyond 10 years pending disposition," and that no further NEPA study was necessary. 2002 SA at 8.

e.

During 2001, the schedule for design, construction, and operation of the immobilization facility at SRS was delayed indefinitely by budgetary constraints. The DOE thereafter announced, inter alia, in its April 19 ROD: (1) that it was cancelling its plans to immobilize plutonium at SRS; and (2) that SRS-KAMS had been selected as the consolidated long-term storage site for the surplus plutonium at Rocky Flats. 67 Fed.Reg. 19,432 (Apr. 19, 2002). The April 19 ROD also stated that the prospect of disposing of surplus plutonium by converting it into MOX Fuel was still under consideration by the DOE and would be determined after further study. In reaching the decisions set forth in the April 19 ROD, the DOE expressly relied on the fact that it had "reviewed the [1996] PEIS and related Supplement Analyses and . . . determined that the analyses remain valid for the decisions announced herein." *Id.* at 19,434. Observing that those analyses had explored the impact of the long-term storage of plutonium at SRS generally, and at SRS-KAMS in particular, the DOE concluded that the environmental effects of the long-term storage of the Rocky Flats plutonium at SRS-KAMS had been adequately considered. *Id.* The DOE therefore determined that it need not perform any further study of the environmental consequences of its decision. Upon issuance of the April 19 ROD, the DOE indicated that it would immediately begin shipment of the Rocky Flats plutonium to SRS.

C.

On May 1, 2002, Governor Hodges filed his complaint against the DOE in the District of South Carolina. The Governor sought a declaratory judgment that the DOE's

April 19 ROD contravened NEPA, and he also sought an injunction prohibiting the DOE from transferring surplus plutonium from Rocky Flats to SRS. Following a hearing conducted in Aiken on June 13, 2002, the district court orally ruled against the Governor. In so doing, the court granted the DOE's motion for summary judgment and declined to enjoin the DOE's transfer of the Rocky Flats plutonium to SRS. Four days later, the court filed its Opinion, reducing its bench ruling to writing.[11]

Governor Hodges then filed a timely appeal from the adverse rulings of the district court. He also moved for an injunction pending appeal, seeking to have us enjoin the DOE from shipping the Rocky Flats plutonium to SRS during his appeal. By Order of June 20, 2002, we declined to award the Governor such an injunction, and we expedited this proceeding. On appeal, Governor Hodges maintains that the DOE failed to comply with NEPA before issuing its April 19 ROD, and he requests that we enjoin the DOE from shipping the Rocky Flats plutonium to SRS until the DOE has fulfilled its NEPA obligations.[12] In

---

[11] According to media reports issued prior to the district court's Opinion, Governor Hodges asserted that he would lie down in the highway to block any shipment of plutonium into South Carolina. After the court rejected his request for injunctive relief, the Governor issued an executive order declaring that the "transportation of plutonium on South Carolina roads and highways is prohibited." The court, on June 18, 2002, issued a permanent injunction against the Governor, prohibiting him from interfering with the DOE's plutonium shipments "into or through South Carolina." *Dep't of Energy v. Hodges,* C.A. No. 1:02-2078-22, Order (D.S.C. June 18, 2002). We are not called on to address any issues concerning that injunction.

[12] In his complaint, Governor Hodges asserts that the April 19 ROD makes SRS the nation's long-term storage site for surplus plutonium, and he seeks an injunction prohibiting the DOE from shipping "any

(Continued on following page)

response, the DOE asserts that Governor Hodges lacks standing to initiate and pursue this case, and that it has complied with NEPA.[13]

III.

Because our jurisdiction has been called into question, we must, before turning to the merits of Governor Hodges's appeal, first examine whether he possesses the necessary standing to pursue this action. While the DOE did not raise the issue of standing in the district court, standing to sue is a jurisdictional issue of constitutional dimensions, and it may be raised and addressed for the first time on appeal.[14] *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94-95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

---

surplus plutonium from Rocky Flats or anywhere else to SRS unless and until DOE complies with applicable law." The April 19 ROD, however, dealt solely with the shipment and storage of the six metric tons of Rocky Flats plutonium. As such, we are called on to address only that decision.

[13] This dispute does not relate to the storage of nuclear waste at Yucca Mountain, Nevada. The Yucca Mountain facility is intended to serve as a permanent repository for spent nuclear fuel and high-level radioactive waste, while this case involves the storage of surplus weapons-grade plutonium.

[14] The DOE initially raised the issue of standing on July 2, 2002, when it submitted its brief on appeal. Governor Hodges was thereby first able to respond to the issue in his reply brief of July 5, 2002. In these circumstances, interests of professional courtesy and judicial efficiency dictate that the DOE should have communicated its intention to challenge standing more promptly. That said, we appreciate the diligence and able assistance of all counsel in this expedited proceeding.

Pursuant to Article III of the Constitution, federal courts may only adjudicate actual cases and controversies.[15] *Allen v. Wright,* 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). The standing doctrine is designed to ensure that federal litigants possess a sufficiently personal stake in the outcome of any litigation they pursue. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *see also Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.,* 454 U.S. 464, 473, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) (observing that federal courts are not "publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding"). As spelled out by the Supreme Court, the "irreducible constitutional minimum of standing contains three elements." *Defenders of Wildlife,* 504 U.S. at 560, 112 S.Ct. 2130. In order to possess standing to sue, a plaintiff must show (1) that he has suffered an "injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) that his injury is "fairly traceable to the challenged action of the defendant"; and (3) that his injury will likely be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 180-81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (quotation and citation omitted);

---

[15] The constitutional underpinning of the doctrine of standing to sue is found in Section 2 of Article III of the Constitution of the United States, which provides in pertinent part that:

> The judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority . . . [and] to Controversies to which the United States shall be a Party[.]

Defenders of Wildlife, 504 U.S. at 560-61, 112 S.Ct. 2130. In this case, Governor Hodges is plainly capable of satisfying the last two elements of the standing test enunciated by the Court. The DOE asserts, however, that the Governor falls short on the first element, because he has not suffered an "injury in fact" as a result of the DOE's proposed actions.

The DOE contends that Governor Hodges's sole interest in this action derives from his responsibility to protect the health and well-being of the residents of South Carolina, and that this lawsuit is therefore a *parens patriae* action. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez,* 458 U.S. 592, 600-02, 102 S.Ct. 3260, 73 L.Ed.2d 995 (1982) (observing that *parens patriae* suit is one in which state asserts injury to well-being of its populace). The Supreme Court has clearly established that a *parens patriae* action cannot be maintained against the Federal Government. *Id.* at 610 n. 16, 102 S.Ct. 3260; *Massachusetts v. Mellon,* 262 U.S. 447, 485-86, 43 S.Ct. 597, 67 L.Ed. 1078 (1923) ("[I]t is no part of [a state's] duty or power to enforce their rights in respect of their relations with the federal government. In that field it is the United States, and not the state, which represents them as *parens patriae.*"). As such, if Governor Hodges seeks only to protect the health and well-being of the residents of South Carolina, his action is of the *parens patriae* variety, and it may not be pursued.

Governor Hodges maintains, however, that the interests underlying his challenge to the DOE are not simply in protecting the well-being of South Carolinians. Rather, he contends that he has suffered an injury to his procedural rights, and that such an injury is sufficient to provide him with standing to sue. Pursuant to the Court's decision in

Defenders of Wildlife, a person entitled to a "procedural right," e.g., the right to have the Executive observe procedures mandated by law, can thereby possess Article III standing "without meeting all the normal standards for redressability and immediacy." 504 U.S. at 572 n. 7, 112 S.Ct. 2130. A plaintiff only possesses such standing, however, if "the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *Id.* at 573 n. 8, 112 S.Ct. 2130. In addition, such an interest must be one that falls within the "zone of interests" that the challenged statute is designed to protect. *Clarke v. Sec. Indus. Ass'n,* 479 U.S. 388, 399, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987) ("The essential inquiry is whether Congress intended for a particular class of plaintiffs to be relied upon to challenge agency disregard of the law.").

Governor Hodges contends that he possesses a "threatened concrete interest" deriving from his proprietary interest and control, as Governor, over vast swaths of land and natural resources owned by South Carolina, including the State's highways, its streams, and its woodlands. In addition, the Governor notes that, under the South Carolina Pollution Control Act, S.C.Code § 48-1-10 *et seq.,* he bears official responsibility for preserving the State's groundwater, and that under the Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j, he has a similar duty to preserve and protect public drinking water. Governor Hodges maintains that these interests are all threatened by the DOE's uninformed shipment of plutonium into South Carolina and its proposed storage of such plutonium at SRS. He therefore contends that he has shown a sufficient procedural injury to accord him standing, in his capacity as Governor, to sue the DOE.

Thus, whether Governor Hodges possesses standing to sue the DOE turns on whether his asserted proprietary interests in the land, streams, and drinking water of South Carolina are sufficiently concrete to qualify as the bases for a recognized procedural right. As Justice Scalia observed in *Defenders of Wildlife,* an individual living next to the proposed site for a federally licensed dam would possess standing to challenge a failure to comply with NEPA, while an individual living across the country from the dam would not possess any such standing. 504 U.S. at 572 n. 7, 112 S.Ct. 2130. It is uncontroverted that at least one state highway runs through SRS, and that several streams and wildlife habitats are located near SRS. In these circumstances, the Governor, in his official capacity, is essentially a neighboring landowner, whose property is at risk of environmental damage from the DOE's activities at SRS. Governor Hodges therefore has a concrete interest that NEPA was designed to protect; as such, he is not merely pursuing a *parens patriae* action, and he possesses the requisite standing to enforce his procedural rights under NEPA.

Because Governor Hodges has standing to initiate and maintain his NEPA challenges to the DOE's actions, we possess jurisdiction, pursuant to 28 U.S.C. § 1291, to consider his appeal. We therefore turn to the merits thereof.

IV.

We review de novo an award of summary judgment by a district court. *Shaw v. Stroud,* 13 F.3d 791, 798 (4th Cir.1994). In reviewing an agency's efforts to comply with NEPA, we are required to perform a two-step analysis.

First, we examine whether the agency took a "hard look" at a proposed project's environmental effects before acting. *Hughes River Watershed Conservancy v. Glickman,* 81 F.3d 437, 443 (4th Cir.1996). In essence, we assess whether "the adverse environmental effects of the proposed action [have been] adequately identified and evaluated" prior to final decisionmaking. *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 350, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989). If we are satisfied that the agency has taken the mandated "hard look" at the environmental effects of a proposed agency action, we must then consider whether the agency's conclusions are arbitrary or capricious. *Hughes River,* 81 F.3d at 443. Thus, in conducting our NEPA inquiry, we must "make a searching and careful inquiry into the facts and review whether the decision [of the agency at the time it was made] was based on consideration of the relevant factors and whether there has been a clear error of judgment." *City of Alexandria v. Fed. Highway Admin.,* 756 F.2d 1014, 1017 (4th Cir.1985) (internal quotations and citations omitted). If the agency has followed the proper procedures, and if there is a rational basis for its decision, we will not disturb its judgment.

V.

In his assertion that the DOE failed to comply with NEPA, Governor Hodges raises three separate contentions. Two of these contentions are of a substantive nature, while the third involves a procedural point. First, he maintains that the 2002 SA failed to fully evaluate the risks of long-term storage of surplus plutonium at SRS-KAMS. Second, the Governor contends that the 2002 SA only considered the potential effects of storing plutonium

at SRS- KAMS for up to twenty years, rather than evaluating the fifty-year storage period selected by the DOE in its April 19 ROD. Finally, as a procedural matter, the Governor asserts that the DOE failed to complete the required NEPA documents before issuing the April 19 ROD.

A.

Before proceeding to address the specific contentions of Governor Hodges, it bears emphasizing that NEPA is an "action-forcing" statute. It requires federal agencies to identify and evaluate the environmental consequences of their proposed actions. *Robertson,* 490 U.S. at 350, 109 S.Ct. 1835; *Hughes River,* 81 F.3d at 443. Under NEPA, an agency is obliged to take a "hard look" at a proposal's environmental consequences before deciding to proceed; however, once it has taken such a look, the agency is not obligated to choose any particular course of action. *Robertson,* 490 U.S. at 350, 109 S.Ct. 1835. Moreover, if the agency has taken the required "hard look," we must defer to it unless its decisions were arbitrary or capricious. *Hughes River,* 81 F.3d at 443. Therefore, in assessing the merits of Governor Hodges's contentions, we must consider whether the DOE adequately identified and evaluated, prior to its April 19 ROD, the environmental consequences of storing the Rocky Flats plutonium at SRS-KAMS. If we conclude that the DOE acted properly in that connection, we must then determine whether the decisions it premised on that analysis were arbitrary or capricious.[16]

[16] The DOE asserts that its decisionmaking with respect to the storage and disposition of plutonium implicates foreign policy and

(Continued on following page)

In most instances, the DOE will discharge its NEPA responsibility to take a "hard look" at potential environmental consequences by completing, prior to undertaking a proposed action, either an EIS, an SEIS, an EA, or an SA. However, in order to make an "initial determination about whether a change or new information meets the threshold of 'significance' or 'uncertainty' needed to require further environmental documentation," the DOE may also review and consider previously-issued NEPA documents. *See Piedmont Envtl. Council v. United States Dep't of Transp.*, 159 F.Supp.2d 260, 270-71 (W.D.Va.2001). In essence, the DOE is entitled to conduct a preliminary inquiry into whether the environmental impact of a change in an existing proposal is even possibly significant. If the DOE concludes, based on such a preliminary inquiry, that the environmental effect of the change is clearly insignificant, it has taken the "hard look" required by NEPA, and no further NEPA documentation is necessary. See *Idaho Sporting Congress Inc. v. Alexander*, 222 F.3d 562, 566 (9th Cir.2000) (concluding that agency may use

---

national security concerns. As such, it contends that our review of the NEPA compliance issues should be more deferential than our normal standard of review. *See Envtl. Defense Fund, Inc. v. Massey*, 986 F.2d 528, 535 (D.C.Cir.1993); *cf. Hamdi v. Rumsfeld*, 296 F.3d 278, 2002 WL 1483908, slip op. at 5 (4th Cir.2002) ("[I]n the context of foreign relations and national security . . . a court's deference to the political branches of our national government is considerable."). As the D.C. Circuit has explained, the Government, in such circumstances, "may avoid the EIS requirement where U.S. foreign policy interests outweigh the benefits derived from preparing an EIS." *Id.* Because we are satisfied, applying our normal standard of review, that the DOE did not contravene NEPA, we need not consider whether foreign policy and national security considerations warrant some heightened deference to the DOE's decisions.

"non-NEPA environmental evaluation procedures" to determine "whether new information or changed circumstances require the preparation of a supplemental EA or EIS"); *Price Rd. Neighborhood Ass'n v. United States Dep't of Transp.*, 113 F.3d 1505, 1510 (9th Cir.1997). The DOE's authority to conduct such a review is limited; it may only conduct such a preliminary inquiry to determine whether it is possible that the altered proposal's environmental impact will be significant. Idaho Sporting Congress, 222 F.3d at 566. If "the environmental impacts resulting from the design change are significant or uncertain, as compared with the original design's impacts," then the DOE must complete additional NEPA documentation. *Price*, 113 F.3d at 1508-09.

B.

In his first contention on the merits, Governor Hodges maintains that the DOE failed to adequately consider the risks of long-term storage of the Rocky Flats plutonium at SRS-KAMS. Contrary to his position, however, the 2002 SA evaluated whether the long-term storage of surplus plutonium at SRS-KAMS would create any environmental consequences not considered by the DOE in its earlier NEPA compliance documents. In performing this evaluation, the 2002 SA explicitly incorporated the DOE's 1996 PEIS and its 1998 SA, as well as other NEPA materials relating to the potential environmental effects of surplus plutonium being shipped into South Carolina and stored at SRS. *See* 40 C.F.R. § 1502.21 (permitting incorporation of materials by reference to "cut down on bulk without impeding agency and public review of the action"). By its 1996 PEIS, the DOE had examined various options for the long-term storage of surplus plutonium, including its

possible storage at the proposed APSF facility at SRS for up to fifty years. And the 1998 SA had explored whether temporary storage of the surplus plutonium at SRS-KAMS, for a period of up to ten years, would create any environmental consequences not contemplated in the 1996 PEIS. In the 2002 SA, the DOE examined whether storage of surplus plutonium at SRS-KAMS for a period longer than ten years would create any additional impacts on the environment or would increase the risk of a nuclear accident. 2002 SA at 5-6. After performing this evaluation, the DOE concluded in the negative, stating that:

> *The potential impacts from the storage of surplus plutonium materials in the KAMS facility* at SRS, pending final disposition, *are not significantly different* than or are bounded by the impacts identified in the [1996 PEIS].

Id. at 8 (emphasis added).

In view of the foregoing, Governor Hodges has failed to identify any particular risk arising from the long-term storage of surplus plutonium at SRS-KAMS that was not addressed by the 2002 SA or the NEPA materials incorporated by reference therein. As such, we must conclude that the DOE, in the 2002 SA, fulfilled its NEPA obligations by taking a "hard look" at the risks of long-term plutonium storage at SRS-KAMS.

C.

Governor Hodges next contends that the 2002 SA only contemplated storage of the Rocky Flats plutonium at SRS-KAMS for a period of twenty years, rather than for a period of fifty years. In support of this contention, he points to its statement that the "DOE plans to [dispose of]

its surplus plutonium as soon as practical and believes storage in KAMS would be necessary for less than 20 years." *Id.* Although this provision suggests that the DOE hoped (and perhaps continues to hope) to dispose of the surplus plutonium within twenty years, this isolated statement, standing alone, does not resolve the question of whether the DOE had analyzed the potential environmental consequences of plutonium storage at SRS-KAMS for a longer period. Indeed, the 2002 SA specifically analyzed the environmental impact of plutonium storage at SRS-KAMS for up to fifty years. *See id.* at 5-6 ("For the SRS workforce, storage operations at KAMS will add 0.13 Latent Cancer Fatality (LCF) for up to 50 years. . . ."). Moreover, and importantly, the 2002 SA incorporated the 1996 PEIS into its assessment and findings, and it explicitly compared the 1996 PEIS's study of long-term storage of surplus plutonium at APSF (for up to fifty years) with the DOE's new plan to store the plutonium at SRS-KAMS. We therefore find ourselves in agreement with the district court, which concluded after careful analysis that "it is clear that the fifty-year impacts of storage in general, and storage at KAMS, in particular, were examined." Opinion at 26.

D.

Governor Hodges's final contention on appeal is that, even if the DOE substantively examined the environmental effects of its proposed action, it failed to comply with NEPA's procedures in connection with its April 19 ROD. As the district court properly observed, "the April 19 ROD decouples storage and disposition, taking away a precondition to storage of Rocky Flats plutonium at SRS which had been found in all prior RODs (approval of SRS

for the immobilization facility)." *Id.* at 23. The Governor asserts that this change in the DOE's proposal – from storage at SRS-KAMS pending disposition to storage at SRS-KAMS without regard to disposition – required the DOE to prepare and file another NEPA compliance document, such as an SA. He maintains that the DOE was required to examine whether this change in its proposal created any significant environmental impacts not previously studied, and that it had therefore failed to take a "hard look" at the environmental consequences of its April 19 ROD.

In fact, however, the DOE properly explored, prior to issuance of the April 19 ROD, whether the decoupling of plutonium storage from plutonium disposition created any new environmental concerns. The April 19 ROD specifically referenced those earlier NEPA compliance materials, and it explained the analyses they had made. After noting that the 1998 SA had analyzed the impact of storage of the Rocky Flats plutonium at SRS-KAMS for a period of ten years, the April 19 ROD made the following pertinent observation:

> [T]he storage of surplus plutonium in the KAMS facility could extend beyond the 10-year period estimated in [the 1998 SA]. Therefore, DOE prepared [the 2002 SA] . . . which evaluated the potential for storage beyond 10 years at the KAMS facility. That SA concluded that potential impacts from the continued storage of surplus plutonium in the KAMS facility at SRS for this additional period are not substantially different from those addressed in the original analysis of storage in APSF contained in [the 1996 PEIS].

67 Fed.Reg. 19,434 (Apr. 19, 2002). As this provision makes clear, the DOE, prior to issuing its April 19 ROD, conducted a preliminary inquiry by examining its previous NEPA documents, and it concluded that its decision to decouple the storage of surplus plutonium from the disposition clearly did not create any significant environmental impacts. *Idaho Sporting Congress,* 222 F.3d at 566; *Piedmont Envtl. Council,* 159 F.Supp.2d at 270-71. As such, because it was apparent that the proposed change did not create a new environmental picture from that previously studied, the DOE decided that no further NEPA documentation was necessary. In these circumstances, we are satisfied that the DOE took a "hard look" at the environmental consequences of its proposed course of action prior to promulgating its April 19 ROD. *Idaho Sporting Congress,* 222 F.3d at 566 (recognizing limited role for non-NEPA environmental evaluation procedures to determine whether supplemental EA or EIS is required). Therefore, because the DOE has complied with the requirements of NEPA, and because its decision to place the Rocky Flats plutonium in long-term storage at SRS-KAMS was neither arbitrary nor capricious, we will not disturb it.[17]

---

[17] Governor Hodges also maintains that the DOE's decisionmaking process violated the Administrative Procedure Act (the "APA"). Under the APA, we must uphold an agency decision if it is supported by "substantial evidence," and is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), (E). In conducting our review under the APA, "we perform only the limited, albeit important, task of reviewing agency action to determine whether the agency conformed with controlling statutes, and whether the agency has committed a clear error of judgment." *Maryland Dep't of Human Res. v. United States Dep't of Agric.,* 976 F.2d 1462, 1475 (4th Cir.1992) (internal quotations and citations omitted). In

(Continued on following page)

VI.

Pursuant to the foregoing, Governor Hodges's NEPA challenge is without merit and the district court's award of summary judgment to the DOE is affirmed.

AFFIRMED.

---

view of the DOE's compliance with NEPA, the Governor's APA challenge is also without merit.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

Jim Hodges, Governor of the State of South Carolina, in His Official Capacity, Plaintiff, v. **Spencer Abraham,** Secretary of the Department of Energy, in His Official Capacity and the **United States Department of Energy,** Defendants.	)	**CIVIL ACTION NO. 1:02-1426-22**

MEMORANDUM OPINION AND ORDER GRANTING DOE'S MOTION FOR SUMMARY JUDGMENT AND DENYING GOVERNOR HODGES' MOTION FOR A PRELIMINARY INJUNCTION

(Filed Jun. 17, 2002)

TABLE OF CONTENTS

INTRODUCTION 3

DISCUSSION 5

I. **DOE'S MOTION FOR SUMMARY JUDGMENT ON HODGES' COMPLAINT** 5

A. **National Environmental Policy Act (NEPA)** 6

B. Standard of Review Under Administrative Procedure Act (APA) 10

C. History of NEPA Compliance in this Action 12

1. The 1996 S&D PEIS 14

2. July 1998 Supplement Analysis 15

3. February 2002 Supplement Analysis 17

4. April 19, 2002 Amended Record of Decision 19

D. Analysis of NEPA Compliance 20

II. HODGES' MOTION FOR PRELIMINARY INJUNCTION 26

A. Likelihood of Irreparable Harm to Plaintiff 27

B. Likelihood of Harm to Defendant 31

1. DOE's Arguments as to Harm to DOE Caused by Injunction 31

a. Foreign Policy Interests 32

b. National Security Interests 34

c. Costs and Delay in Rocky Flats Clean-up 34

2. Hodges' Arguments as to Harm to DOE Caused by Injunction 35

a. Foreign Policy Interests 35

b. National Security Interests 37

c. Costs & Delay in Rocky Flats Clean-up 38

3. Court's Analysis of Harm to DOE if Injunction Granted 39

a. Harm to Foreign Policy Interests 39

b. Harm to National Security 41

c. Substantial Additional Costs and Delay in Rocky Flats Clean-up 42

d. Disruption of Planned Activities at SRS 42

e. Conclusion as to Harm to Defendant 42

C. Balance of Harms to Parties 43

D. Likelihood of Success on the Merits .. 44

E. Public Interest 45

F. The Equitable Balance 45

CONCLUSION 45

INTRODUCTION

Plaintiff Jim Hodges, the Governor of South Carolina (Hodges), initiated this action on May, 1, 2002, challenging the April 19, 2002, Amended Record of Decision (April 19, 2002 ROD) by Defendants, Spencer Abraham, Secretary of the Department of Energy and the United States Department of Energy (collectively DOE), to, *inter alia*, transfer six metric tons of surplus plutonium from Rocky Flats Environmental Technology Site ("Rocky Flats") to the Savannah River Site ("SRS") in South Carolina for long-term storage. Specifically, Hodges asserts that the April 19, 2002 ROD was issued in violation of both the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d (NEPA), and the Administrative Procedure Act, 5 U.S.C. § 702 et seq. (APA).

This matter came before the court for hearing on June 13, 2002, on Hodges' motion for preliminary injunction and DOE's motion for summary judgment on the complaint. At the conclusion of the hearing, the court ruled from the bench, granting DOE's motion for summary judgment and denying Hodges' motion for a preliminary injunction.[1] Two other pending motions were also ruled on orally at the time of the hearing and have been dealt with by separate orders: DOE's motion for summary judgment on its counterclaim; and DOE's motion to seal certain portions of the record.

At the time of the hearing DOE had indicated an intent to begin immediate shipments of the Rocky Flats plutonium to SRS as early as June 15, 2002.[2] DOE has since agreed to defer shipments to no sooner than June 22, 2002.

The long-term storage addressed by the April 19, 2002 ROD is independent of any plan to process the surplus plutonium for disposition (at SRS or elsewhere). Prior to April 19, 2002, existing RODs addressed storage pending disposition under a hybrid approach consisting of both immobilization and a program for converting the plutonium to Mixed Oxide Fuel (MOX). Prior RODS also placed conditions on transfer of Rocky Flats plutonium to SRS relative to insuring transfer would not occur unless an

---

[1] The court stated its intention to prepare a written order as soon as possible.

[2] DOE initially indicated that the first shipment might be sent on or after May 15, 2002. DOE subsequently agreed to defer shipment until on or after June 15, 2002, in order to allow this court to receive full briefing on these motions.

immobilization facility was to be located in South Carolina. The most recent ROD, however, cancels plans for immobilization. It also acknowledges that plans for the MOX conversion process are no longer certain as cancellation of immobilization has resulted in the need to redesign MOX with a concomitant need to perform proper environmental studies of the new MOX process as required by NEPA.[3] Thus, the storage authorized by the challenged April 19, 2002 ROD must be analyzed as approval of long-term storage which might extend indefinitely.[4]

In his complaint, Hodges argues that the April 19, 2002 ROD is illegal because: (1) no proper environmental analysis of the potential impact of the currently planned long-term storage has been conducted as required by NEPA (first cause of action); (2) no supplemental environmental impact statement (SEIS) was prepared to address the changes relative to an earlier Environmental Impact Statement (EIS) (second cause of action); (3) prior RODS which imposed conditions on storage of additional surplus plutonium at SRS have not been properly amended to

---

[3] Prior environmental studies and RODS covered both MOX and immobilization. At the time of those studies and decisions, certain categories of surplus plutonium were considered inappropriate for MOX processing. In cancelling the immobilization program, DOE also decided to modify MOX to process these previously excluded categories of plutonium. All parties agree that these modifications require new environmental studies under NEPA. Thus, DOE, at present, still hopes to implement MOX at some time in the future. It cannot, however, state at this time if and when it will be able to do so.

[4] If DOE had not designated the current ROD as selection of the alternative of long-term storage at SRS, it ran the risk of a determination of improper segmentation under NEPA. *See, e.g., South Carolina ex rel. Campbell v. O'Leary*, 64 F.3d 892, 898 (4th Cir. 1995).

eliminate the conditions (third cause of action); (4) the decision contained in the ROD violates the APA as it is arbitrary and capricious; and (5) the manner in which the decision was made violates the APA because it violates the due process rights of the State.[5]

DISCUSSION

I. DOE'S MOTION FOR SUMMARY JUDGMENT ON HODGES' COMPLAINT

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). It is well established that summary judgment should be granted "only when it is clear that there is no dispute concerning either the facts of the controversy or the inferences to be drawn from those facts." *Pulliam Inv. Co. v. Cameo Properties*, 810 F. 2d 1282, 1286 (4th Cir. 1987).

The party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact, and the court must view the evidence before it and the inferences to be drawn therefrom in the light most favorable to the nonmoving party. *United States v.*

---

[5] The complaint also challenged transport of the plutonium in a particular form of container for which DOE was seeking a national security waiver. That issue is now moot as DOE is no longer seeking the waiver.

Diebold, Inc., 369 U.S. 654, 655 (1962). When the defendant is the moving party and the plaintiff has the ultimate burden of proof on an issue, the defendant must identify the parts of the record that demonstrate the plaintiff lacks sufficient evidence. The nonmoving party, here the plaintiff, must then go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e); *see also generally Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

A party "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Beale v. Hardy,* 769 F.2d 213, 214 (4th Cir. 1985). Therefore, "[m]ere unsupported speculation . . . is not enough to defeat a summary judgment motion." *Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 62 (4th Cir. 1995).

In ruling on summary judgment in the present case, the court must also bear in mind the standard of review applicable to the underlying action which is conducted under Section 706 of the Administrative Procedure Act (APA) and provides in part that "a reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Further, the Fourth Circuit has clarified:

> In determining whether agency action violates § 706(2)(A) of the APA, we perform only the limited, albeit important, task of reviewing agency action to determine whether the agency conformed with controlling statutes, and whether the agency has committed a clear error of judgment. . . . [T]he ultimate standard of review is a

> narrow one. The court is not empowered to substitute its judgment for that of the agency.

Zeneca, Inc. v. Shalala, 213 F.3d 161, 167 (4th Cir. 2000) (internal quotations and citations omitted). *See also infra* "Standard of Review Under Administrative Procedure Act."

A. National Environmental Policy Act (NEPA)

The National Environmental Policy Act (NEPA) "declares a national policy of protecting and promoting environmental quality." *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996). *See also* 42 U.S.C. §§ 4321, 4331 (a) (stating that NEPA's policy is "to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony"); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989). To ensure that environmental quality is protected and promoted, NEPA requires federal agencies undertaking projects that will affect the environment to follow certain procedures. Thus, "it is well settled that NEPA does not mandate that agencies reach particular substantive results," only that agencies follow certain procedures before taking action. *Hughes*, 81 F.3d at 443. "If the adverse environmental effects of the proposed action are adequately identified and evaluated, [agencies are] not constrained by NEPA from deciding that other values outweigh the environmental costs." *Robertson*, 490 U.S. at 350.

Procedurally, NEPA requires that federal agencies prepare an environmental impact statement (EIS) "in

every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment." *See* 42 U.S.C. § 4332(2)(C). In determining whether a proposed action might significantly affect the quality of the human environment and necessarily be studied in an EIS, the Council on Environmental Quality (CEQ)[6] requires agencies to consider both the significance of the "context" and the "intensity" of the proposed action. Considering a proposed action in context means:

> that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than the world as a whole. Both short- and long-term effects are relevant.

40 C.F.R. § 1508.27(a). Evaluating the intensity of the proposed action refers to the "severity of impact." *Id.* § 1508.27(b). CEQ regulations also provide several factors to consider when determining the "severity of the impact"

---

[6] The Council on Environmental Quality, created for the purpose of researching and advising the President on environmental matters, *see* 42 U.S.C. §§ 4341-47, has issued guidelines for implementing NEPA. These guidelines are to be followed by all federal agencies. *See Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979). The specific CEQ regulations at issue here are explicitly incorporated into DOE's regulations. *See* 10 C.F.R. §§ 1021.100-103 (1992).

or intensity of the proposed action. The court finds the following factors most relevant to this case:

> (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
> (2) The degree to which the proposed action affects public health and safety.
> . . . .
> (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
> (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
> . . . .
> (8) The degree to which the action . . . may cause loss or destruction of significant scientific, cultural, or historical resources.
> . . . .
> (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

Id. §§ 1508.28(b)(1)-(2), (4)-(5), (8), (10). Courts have viewed the presence of one or more of these factors as an indication that an agency should prepare an EIS. *See Public Serv. Co. of Colo. v. Andrus*, 825 F. Supp. 1483, 1495 (D. Idaho 1993) (quoting *LaFlamme v. FERC*, 852 F.2d 389, 398 (9th Cir. 1988)).

An EIS serves two purposes: (1) when deciding whether to take a proposed action, an EIS ensures that an agency will carefully consider the project's environmental effects, and (2) an EIS ensures that the public will received [sic] relevant information about a proposed project

and play a role in both the decision making process and the implementation of a decision. *See* 40 C.F.R. §§ 1500.1 (b) ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. . . . Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA."), 1502.1 (stating that an EIS must "provide full and fair discussion of significant environmental impacts and shall inform the decision makers and the public of reasonable alternatives"); *Robertson*, 490 U.S. at 349; *Hughes*, 81 F.3d at 443. To serve these dual aims, every environmental impact statement must include:

> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2)(C)(i)-(v).

Once an EIS is prepared, an agency must continue to give careful consideration to the proposed project's environmental consequences, and sometimes submit a supplemental EIS (SEIS). CEQ regulations determine

when an agency must prepare a SEIS. Those regulations require a SEIS when "(i) [t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(i) & (ii).

DOE also has its own regulations to address when a SEIS should be prepared. Those regulations state that "DOE shall prepare a supplemental EIS if there are substantial changes to the proposal or significant new circumstances or information relevant to environmental concerns, as discussed in 40 C.F.R. 1502.9(c)(1)." 10 C.F.R. § 1021.314(a). In the Fourth Circuit, moreover, "substantial" changes in a proposed project or "significant" new circumstances or information will be found to be present when there is a "*seriously* different picture of the environmental impact of the proposed project from what was previously envisioned." *Hickory Neighborhood Defense League v. Skinner*, 893 F.2d 58, 63 (4th Cir. 1990) (internal quotation marks omitted) (emphasis added in the original); *see also Marsh v. Or. Nat'l Res. Council*, 490 U.S. 360, 374 (1989). Significance can be viewed in either quantitative or qualitative terms. *See Envtl. Defense Fund v. Marsh*, 651 F.2d 983, 996 (5th Cir. 1981) (finding that plaintiffs failed to offer evidence that environmental impacts would differ significantly in "either quantity or quality"); *Vine Street Concerned Citizens, Inc. v. Dole*, 630 F. Supp. 24, 29 (E.D. Pa. 1985) (evaluating whether projected increase in traffic was "quantitatively or qualitatively" different from that considered in original EIS). Thus, the principal factor an agency should consider in exercising its discretion whether to prepare an SEIS

because of new information or substantial changes is the extent to which the new information or substantial changes present a seriously different picture of the likely quantitative or qualitative environmental consequences associated with the proposed action not envisioned by the original EIS.

If it is unclear whether a SEIS is required, DOE regulations require the preparation of a Supplement Analysis (SA). A SA "shall discuss the circumstances that are pertinent to deciding whether to prepare a supplemental EIS," (*i.e.*, applicable CEQ regulations found in 40 C.F.R. § 1502.9(c)(1)(i) & (ii)), and "contain sufficient information for DOE to determine whether: (i) [a]n existing EIS should be supplemented; (ii) [a] new EIS should be prepared; or (iii) [n]o further NEPA documentation is required." *See* 10 C.F.R. §§ 1021.314(c)(1), (2)(i)-(iii). Furthermore, "DOE shall make the determination and the related Supplement Analysis available to the public for information." *See id.* § 1021.314(c)(3). If DOE decides to take action on a proposal covered by an EIS, then DOE must prepare a Record of Decision to make available to the public. *See id.* §§ 1021.314(d), 315(b)(d).

B. Standard of Review Under Administrative Procedure Act (APA)

The standard of review for an agency's decision not to prepare a SA or SEIS is provided by the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq.* *See* 5 U.S.C. § 706(2)(A) (giving court the power to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); *Marsh*, 490 U.S. at

375-76. *See also* 5 U.S.C. § 702 (providing a right to judicial review to persons "adversely affected or aggrieved" by federal agency action within the meaning of a relevant statute such as NEPA). In reviewing an agency's decision not to prepare a SA or SEIS, a court must "ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Baltimore Gas & Elec. v. Nat'l Res. Defense Council, Inc.*, 462 U.S. 87, 97-98 (1983). Thus, the court must make two decisions: (1) whether the agency took a "hard look" at the substantial changes to the proposal or significant new circumstances or information related to environmental concerns, and (2) whether the agency's decision not to prepare a SA or SEIS was arbitrary or capricious. *See Hughes*, 81 F.3d at 443 (citing *Marsh*, 490 U.S. at 385). A decision within an agency's discretion is entitled to deference and a court may not substitute its own judgment for that of the agency. *See Kleppe v. Sierra Club,* 427 U.S. 390, 410 n.21 (1976). Within these bounds, however, a court "must make a searching and careful inquiry into the facts and a review of whether the decision [at the time it was made] was based on a consideration of the relevant factors and whether there has been a clear error of judgment" or rather, a rational basis exists for the agency's decision. *See City of Alexandria, Va. v. Fed. Highway Admin.*, 756 F.2d 1014, 1017 (4th Cir. 1985) (internal quotation marks omitted); *Sierra Club v. U.S. Army Corps of Eng'rs*, 772 F.2d 1043, 1050-51 (2d Cir. 1985) (citing *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 290 (1974)).

Generally, "an agency takes a sufficient hard look when it obtains opinions from its own experts, obtains

opinions from experts outside the agency, gives careful scientific scrutiny and responds to all legitimate concerns that are raised." *Hughes River Watershed Conservancy v. Johnson,* 165 F.3d 283, 288 (4th Cir. 1999) (Hughes River II) (internal quotations omitted). The court is not, however, required to accept an agency's conclusory statements in an EA or an EIS. *Lower Alloways Creek Tp. v. Public Serv. Elec. & Gas Co.*, 687 F.2d 732, 741 (3d Cir. 1982) ("An agency cannot ... avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment.").

It is undisputed that in reviewing DOE's decision not to prepare a SA, a SEIS, or another EIS, the court makes its decision based on the administrative record and in light of the above discussed legal standards. In NEPA cases, however, courts have also allowed extraneous evidence in narrow circumstances such as when the evidence: (1) explains technical information or agency action not adequately explained in record; (2) shows an agency failed to consider relevant evidence; or (3) shows an agency, in bad faith, failed to include information it considered in the record. *See Webb v. Gorsuch*, 699 F.2d 157, 159 n.2 (4th Cir. 1983) (considering several affidavits and reports which were not made part of the "record" in determining whether the agency action was arbitrary or capricious) (citing *County of Suffolk v. Sec'y of the Interior*, 562 F.2d 1368, 1384 (2d Cir.1977), and cases cited therein)).

C. History of NEPA Compliance in this Action

The decisions challenged in this action are DOE's decisions, as stated in the April 19, 2002 ROD, to: (1) cancel plans to build any immobilization facilities (at SRS or elsewhere); (2) select "the alternative of immediate implementation of consolidated long-term storage at [SRS] of surplus plutonium now stored separately at [Rocky Flats] and SRS;" and (3) "[u]tilize the KAMS facility for consolidated long-term storage of surplus plutonium."[7] 67 Fed. Reg. at 19432 & 19435 (Def. Ex. F). Only the latter two decisions are discussed here.[8]

Hodges argues that these decisions are illegal because DOE has not complied with NEPA's requirements for proper study of the environmental impacts of either: (1) long-term storage of Rocky Flats plutonium at SRS; or (2) use of the KAMS facility for long-term storage. DOE

---

[7] "KAMS" refers to the "K-Area Materials Storage" facility which is located in Building 105K. See infra July 1998 Supplement Analysis.

[8] The court has concluded that the cancellation of immobilization is not, in and of itself, subject to challenge under NEPA. Rather, the significance of cancellation of immobilization is that it either means that plutonium slated for immobilization would remain in long-term storage or would require processing by other means not yet studied. DOE has announced its decision to study processing this additional plutonium into MOX fuel. This has led to placement of the previously studied and approved MOX fuel process on hold, to allow for redesign and corresponding NEPA review. The net effect of these two decisions is that, unless and until a new MOX (or other) process has undergone proper review and been accepted as the proper course of action by DOE, it must be presumed that any storage at SRS is long-term storage. Thus, this analysis focuses on the latter two decisions: to move Rocky Flats plutonium to SRS for long-term storage and to use the KAMS facility for that storage.

responds that it has adequately studied both aspects of the present decision, pointing to the following evidence of NEPA compliance:

December 1996 PEIS – **"Storage and Disposition of Weapons-Usable Fissile Materials Final Programmatic Environmental Impact Statement"** (1996 S&D PEIS) – Def. Ex. B (Summary) & H (Vol. I);

July 1998 SA – **"Supplement Analysis for Storing Plutonium in the Actinide Packaging and Storage Facility and Building 105-K at the Savannah River Site"** (July 1998 SA) – Def. Ex. I;

February 2002 SA – **"Supplement Analysis for Storage of Surplus Plutonium Materials in K-area Material Storage Facility at SRS"** (February 2002 SA) – Plaintiff Ex. 16, Defendant Ex. K.

See DOE's June 10, 2002 Reply at 3 (stating that "the question before the court is fairly simple. Does this combination of the 1996 PEIS and the two Supplement Analyses (SA) demonstrate that DOE evaluated the environmental impacts of its proposed action as required by NEPA?"). These documents are summarized below.

1. The 1996 S&D PUS

The 1996 S&D PEIS studied a variety of alternatives for storage and disposition of a range of nuclear materials stored at various sites throughout the country. Among the alternatives studied was the "No Action" alternative of leaving all materials at their present locations. This alternative was compared to various consolidation alternatives which would have involved SRS ranging from transfer of Rocky Flats surplus plutonium to SRS up to "collocation" of all of DOE's surplus plutonium and highly enriched uranium (HEU) at SRS.

In places, the summary of this EIS distinguishes between the studied plans for nonsurplus and surplus plutonium, referring to plans for long-term storage of up to fifty years only as to *non*surplus plutonium and "storage pending disposition" for *surplus* plutonium. E.g., S-2, S-4, S-6. *See also* Vol. I at 1-5. Nonetheless, when read in their entirety, it appears from both the summary and the full PEIS that in-depth consideration was given to various long-term storage options for surplus plutonium under circumstances such as the present: where disposition was intended but could not be assumed to be available due to various uncertainties as to development and approval of the necessary technology.[9] *E.g.*, S-42 to S-43, Vol. I at 1-6 &

---

[9] Although generally programmatic in scope, this EIS considered "the maximum site impacts that would result at [each of the sites under consideration, including] SRS from combining the Preferred Alternative for storage with the Preferred Alternative for disposition at each of these sites." S-25. *See also* S-27 to S-42 (discussing the various categories of environmental impact of the combined alternatives on each of the different potential sites). Site specific cumulative impacts were also addressed under various alternatives including Long-Term Storage

(Continued on following page)

1-12. It also appears that whatever storage was considered was assumed to be for a period of up to fifty years. *E.g.*, Vol. I, Chart at 2-166.

Nonetheless, as to all long-term storage alternatives, the PEIS presumes that a new facility known as the Actinide Packaging and Storage Facility (APSF) would be built at SRS. *E.g.*, S-7 (stating surplus plutonium from Rocky Flats brought to SRS would be stored in "an expanded, planned new facility" which refers to the "planned new [APSF] . . . upon completion"); S-18 (discussing No Action alternative of leaving all materials at their current sites with the materials being stored in "modified or new facilities . . . designed to operate for up to 50 years"). This assumption is, presumably, based on an earlier decision, made in 1995, to build the APSF at SRS in order to stabilize, package and store materials already located at SRS.[10] Thus, the references in the PEIS to an "expanded, planned new facility" for receipt of the Rocky Flats materials recognize that modifications would be required to the already planned APSF to accommodate the added materials from Rocky Flats. *See also* S-16 (noting that "any new facility construction deemed necessary to maintain safe, secure storage would be addressed in appropriate, individual site-specific EISs"); S-19 (discussing potential

---

Alternatives and the identified Preferred Alternative. S-43 (listing areas for which impacts were identified as to each site as to the long-term storage alternatives).

[10] *See* October 20, 1995, Interim Management of Nuclear Material Environmental Impact Statement, Administrative Record Item 33; December 19, 1995 Record of Decision and Notice of Preferred Alternatives for the Interim Management of Nuclear Materials EIS, 60 Fed. Reg. 65300, Administrative Record Item 32.

construction of an entirely different facility if plutonium from all sites was brought to SRS – "collocation" option).

2. July 1998 Supplement Analysis

The impetus for the July 1998 SA was DOE's desire to begin shipments from Rocky Flats to SRS before the APSF facility would be completed.[11] To that end, this SA addresses "use of Building 105-K at SRS for plutonium storage in addition to changes to the conditions established in the January 1997 Record of Decision." SA at 1. In addition to use of Building 105-K (KAMS), this SA addresses "processing plutonium from [Rocky Flats] in the F-Area (FB-Line) at SRS for declassification purposes, and packaging this declassified material at SRS to meet DOE's long-term storage standard." SA at 2. *See also* SA at 6 (discussing use of FB-Line for declassification); SA at 10 (estimating declassification would require four years using the FB-Line).

As to KAMS, this SA provides:

> Portions of Building 105-K would be modified to enable safe, secure plutonium storage. Safeguards and security features would be upgraded, criticality monitoring devices would be installed, structural features would be inspected and repaired, and roof vents would be added and doors would be modified. Several areas of the

[11] The July 1998 SA acknowledges, nonetheless, that early movement of Rocky Flats surplus plutonium to SRS is only one of a number of modified actions necessary to allow early closure of Rocky Flats. SA at 3-4. Some of these other actions required NEPA review. SA at 4.

> facility would be decontaminated and excess equipment would be removed to provide additional floor space.

SA at 5 (also providing specifics as to certain modifications). *See also* SA at 19 (estimating that the modifications would require 18 months to complete). The July 1998 SA also provides: "Once APSF is operating, DOE could transfer RFETS material from Building 105-K to the APSF to allow for operational flexibility. The plutonium from RFETS . . . would remain in storage at the APSF and Building 105-K pending disposition." SA at 6. *See also* SA at 9 (noting maximum storage capacity in Building 105-K is 15 metric tons). The radiological risks of storage in Building 105-K were evaluated for a ten year period. SA at 17.

This SA concludes:

> The impacts of the proposed action on many resource areas are comparable to the impacts identified in the Storage and Disposition PEIS's Preferred Alternative. The proposed action would result in a higher level of waste generation and electrical usage. . . . However, these increases are well within the SRS's waste treatment capabilities and electrical capacity. . . . The Supplemental Analysis shows that the proposed action does not make a substantial change to environmental concerns evaluated in the Storage and Disposition PEIS. Also, the proposed action does not present significant new circumstances or information relevant to the environmental concerns evaluated in the Storage and Disposition PEIS.

SA at 23-24.

3. February 2002 Supplement Analysis

The proposed action addressed by the February 2002 Supplement Analysis is to:

> continue with the previous decision to store surplus plutonium from [Rocky Flats] in KAMS pending disposition. In addition, DOE is proposing to use the KAMS facility for interim storage of surplus plutonium from other DOE sites, as needed. The storage of surplus plutonium materials in KAMS could extend beyond the 10 years estimated in the [July 1998 SA]. KAMS would serve as an interim storage facility pending disposition of the materials. DOE would also maintain the SRS Surveillance Program and the K-Area Structural Assessment Program to provide the basis for continued safe storage of the surplus plutonium materials beyond 10 years in the KAMS facility.

SA at 3.

The February 2002 SA describes the July 1998 SA as supporting storage of up to 15 metric tons of surplus plutonium in KAMS for up to 10 years, pending construction of APSF. It acknowledges that DOE cancelled plans to build APSF in January 2001, substituting plans to (1) install stabilization and packaging capability in Building 235-F; (2) use existing vault space in the same building; (3) use space in the FB-Line for interim storage pending final disposition; and (4) continue to use existing vault space in Building 105-K.". This SA also refers to the subsequent decision to install stabilization and packaging facilities on the FB-Line. SA at 3.

This SA undertakes to compare the increased risks posed by extended use of KAMS to the risks previously

considered in the above referenced PEIS and SA. It states that the radioactive waste estimates originally provided for storage at APSF for up to fifty years

> would not significantly change for KAMS for two reasons. First, storage at KAMS does not involve opening the 9975 shipping containers or otherwise exposing the facility areas or personnel to radioactive contamination. Secondly, the expected periodic maintenance and surveillance operations involving the 9975 shipping containers do not exceed the anticipated handling operations previously analyzed for APSF.

SA at 5. It also finds "no significant additional radiological impacts to either the general public or non-involved workers beyond 10 years from normal storage operations in KAMS." *Id.*

As to the risk of harm in the event of an accident, the February 2002 SA relies on the evaluation in the 1998 SA which found that "accident impacts associated with KAMS would be at least three orders of magnitude greater than the potential impacts from APSF" due to the lack of a HEPA filtration system. SA at 6. Nonetheless, because the risk of such an accident is viewed as very small, this SA, as the one before it, finds the difference in magnitude of harm from any accident (1000 times greater) does not justify further study through a new EIS. SA at 6.

Structural considerations are also addressed, including specific concerns which had been raised by the Defense Nuclear Facilities Safety Board (DNFSB). The February 2002 SA contains a fairly technical discussion of wall thickness and characteristics, noting some concerns and an inability to make "an accurate determination of the remaining life of the structure." SA at 7. Rather than

finding this to require further study before a decision was made, this SA indicates that the issue will be addressed through "follow-up condition surveys of the Building 105-K structures every five years to assure safe storage at KAMS beyond 10 years."

The February 2002 SA also relies on the protection provided by the combination of the 3013 storage containers and the 9975 shipping containers. It notes that the 9975 shipping containers "were qualified for a minimum 10-year life." It, therefore, requires "periodic surveillance of the Celotex packing material as well as the O-ring seals." This will be accomplished by removing ten containers per quarter, transporting them to the FB-line, opening them for inspection and maintenance, then resealing them and returning them to KAMS. SA at 7.

Based on this discussion, the SA concludes:

> The potential impacts from the storage of surplus plutonium materials in the KAMS facility at SRS, pending final disposition, are not significantly different than or are bounded by the impacts identified in the preferred storage alternative for SRS in the S&D PEIS. There are no significant non-radiological impacts for storage in KAMS. The radiological impacts from normal storage operations at KAMS are not significantly different than those previously analyzed for APSF. The potential radiological accident impacts from KAMS are still small and comparable to the impacts identified for the Preferred Alternative in the Storage and Disposition PEIS. For a loss of confinement inside KAMS, an unfiltered release would result. However, the APSF/B 105-K SA results show that potential accident impacts at KAMS are still small (less than 1 LCF)

> and have a low frequency of occurrence (less than 1.0E-3 event per year).
>
> A review of these radiological impact analyses (IMNM EIS, S&D PEIS, and APSF/B 105-K SA) allows DOE to conclude that potential impacts for the storage of surplus plutonium materials at KAMS are similar and not significantly different than the impacts for APSF. To further mitigate the potential risks, DOE expects to reduce the annual frequency of the release of radioactive material to less than 1.0E-6 through the application of engineered and administrative controls. The engineered and administrative controls include the implementation of surveillance programs for the 3013 containers inside the 9975 shipping containers and for the structure of Building 105-K. *These results demonstrate that safe storage of surplus plutonium in KAMS can continue beyond 10 years pending disposition. DOE plans to disposition its surplus plutonium as soon as practical and believes storage in KAMS would be necessary for less than 20 years.*

SA at 8 (emphasis added).

4. April 19, 2002 Amended Record of Decision

Through its Amended ROD, DOE makes three revisions to its prior RODs which directly affect SRS. First, it cancels plans for immobilization. Second, it selects "the alternative of immediate implementation of consolidated long-term storage at [SRS] of surplus plutonium now stored separately at [Rocky Flats] and SRS." 67 Fed. Reg. at 19432. Third, it determines to "[u]tilize the KAMS

facility for consolidated long-term storage of surplus plutonium." 67 Fed. Reg. at 19435.

DOE explains the relationship between the first two decisions as follows: "Cancellation of the immobilization facility and selection of this storage alternative remove the basis for the contingency contained in the previous RODs conditioning transport of non-pit surplus plutonium from [Rocky Flats] to SRS for storage on the selection of SRS as the site for the immobilization facilities, and those RODS are so amended." *Id.* While the storage decision is expressly stated to be long-term, DOE, nonetheless, indicates that it is pursuing a MOX disposition strategy as discussed in its recent report to Congress. *Id.* However, "No final decisions regarding the MOX portion of the program will be made until [proper NEPA] reviews are completed." *Id.*

D. Analysis of NEPA Compliance

The 1996 PEIS appears to fully address the environmental considerations relevant to longterm storage of plutonium at SRS, including storage of additional plutonium from Rocky Flats, for a period of up to fifty years. Although that storage was intended to be "pending disposition," the 1996 PEIS recognized that disposition could not be assumed during that period. Thus, the situation studied was similar to the present, where the environmental analysis must assume that long-term storage is required, even though DOE intends to implement one or more disposition technologies, because the disposition technology has not been approved.

In addition, DOE prepared two subsequent Supplement Analyses both of which concluded that a Supplemental EIS was not required. The first, issued in July 1998, approved short-term use of KAMS (up to ten years) awaiting completion of APSF, in order to allow earlier shipment of Rocky Flats plutonium. The second, issued in February 2002, expressly addressed longer-term use which DOE referred to as "interim storage" (SA at 8) and stated, in the conclusion, was not likely to extend beyond twenty years (SA at 8).

At the hearing, counsel for Hodges conceded that the July 1998 Supplement Analysis was adequate to support the decision to utilize KAMS, under the conditions addressed in that SA: short-term use of KAMS to store Rocky Flats and SRS plutonium until APSF was completed. Further, there is no suggestion that any challenge was made to the July 1998 SA at the time it was issued or to the subsequent ROD[12] which relied on it. Neither, apparently, was there any challenge to a later EIS completed in November 1999 which relied on the July 1998 SA.[13]

Hodges does, however, contend that the February 2002 SA failed to adequately consider the risks of long-term use of KAMS. Hodges also argues that, at the least, DOE cannot rely on the February 2002 SA to support its April 19, 2002 ROD authorizing long-term storage of up to fifty years because the 2002 SA presumes storage pending

---

[12] Amended ROD for the Storage and Disposition of Weapons-Usable Fissile Materials, 63 Fed. Reg. 43386 (August 13, 1998).

[13] *See* Surplus Plutonium Disposition Final Environmental Impact Statement (SPD EIS), DOE/EIS-0283, (November 1999). Def. Ex. C (Summary) and D (Vol. I).

disposition (referred to as "interim storage" in this SA) and may be read to address only a twenty-year period. SA at 3 & 8. DOE responds that this is an overly narrow reading of the February 2002 SA because the actual factors considered looked at risks over a fifty-year period.

In this regard, DOE directs the court to specific portions of the 2002 SA addressing various criteria on a fifty-year basis (e.g., the expected useful life of the 3013 containers). *See* Defendant's Reply [in support of] Defendant's Motion for Summary Judgment at 7. Hodges has not countered with direction to any evidence that the evaluation was not adequate to cover the fifty-year period challenged in the April 19, 2002 ROD.

In an affidavit filed in support of Hodges' motion for a preliminary injunction, Plaintiff's expert, Dr. Allison Macfarlane, refers, generically, to the risks of delay in disposition including an unspecified increase in the "potential for accidents (including criticality events), and the potential for exposure to workers and the public." Macfarlane May 3, 2002 Affidavit (Macfarlane I) ¶ 16. Macfarlane also notes that the recent decision "will result in the storage of large quantities of plutonium at [SRS] while it awaits use." Macfarlane I ¶ 21 (also noting that prior decisions coupled disposition and storage). Similarly, she points to the cancellation of APSF, replacement with plans to use facilities in building 235-F, then replacement of that plan with a decision to use the FB-Line as raising concerns. *E.g.*, Macfarlane I ¶ 23-24. She does not, however, provide specific information on which this court can rely to conclude that DOE failed to consider some specific

inadequacy in the changed plans which now envision long-term storage.[14] Rather, she raises a series of questions without pointing to specific inadequacies in the plans and procedures. *Id.* ¶ 26. The most specific concern which Macfarlane addresses is the lack of clarity in the record as to whether the FB-Line has been completed, as this is a function she contends the latest ROD presumes to be in place. *Id.* ¶ 2.

In a subsequent affidavit, Macfarlane addresses the specific risks posed by storage of plutonium in more detail. Macfarlane Affidavit signed June 4, 2002 (Macfarlane II). This affidavit does not, however, address how the current plans for storage are inadequate or, more particularly, how they present significant changes relative to circumstances previously considered in EISs or SAs. E.g., Macfarlane 11 ¶¶ 16-21. She does, however, again identify the one specific concern as to whether the stabilization and packaging facilities at FB-Line have been completed. Id. ¶ 21.

The court inquired into this issue during the hearing. After hearing the testimony of Allen Gunter, DOE's SRS Plutonium Program Manager, the court finds that the February 2002 SA studied using stabilization and packaging capability then existing in Building 235-F pending installation of the stabilization and packaging facilities at FB-Line. Consequently, Dr. Macfarlane's one specific concern was resolved.

---

[14] Most of Macfarlane's more specific concerns relate to potential impacts from the modified MOX procedure. These concerns are not, however, at issue as the MOX process is currently undergoing NEPA review.

Hodges' primary argument is that DOE overstepped the outer bounds of its discretion in deciding to rely on the 2002 SA to support the decision made in the April 19, 2002 ROD. This is because the 2002 SA expressly refers only to storage pending disposition (or "interim storage") and contains language concerning a period not likely to exceed twenty years. By contrast the April 19 ROD decouples storage and disposition, taking away a precondition to storage of Rocky Flats plutonium at SRS which had been found in all prior RODs (approval of SRS for the immobilization facility),[15] and makes SRS the location for long-term

---

[15] Some, if not all, of the prior Records of Decision relating to transfer of the Rocky Flats plutonium to SRS placed as a precondition to transfer that SRS be approved as the site for the immobilization facility. E.g., January 21, 1997 Record of Decision for the Storage and Disposition of Weapons-Usable Fissile Materials Final Programmatic Environmental Impact Statement, 62 Fed. Reg. 3014, 3027. *See also* July 1998 Supplement Analysis for Storing Plutonium in the Actinide Packaging and Storage Facility and Building 105-K at the Savannah River Site at 2 & 4 (recognizing that selection of SRS as the immobilization facility site is a precondition to shipment of plutonium from Rocky Flats). A subsequent decision approved SRS for three related disposition facilities: MOX, immobilization, and pit disassembly. *See* January 11, 2000, Record of Decision for the Surplus Plutonium Disposition Final Environmental Impact Statement, 65 Fed. Reg. 1608.

The record does not reflect how this precondition came to be placed in the earlier RODS, but the court presumes it was a negotiated provision to allay South Carolina's fears that it might become the permanent repository for the surplus plutonium and, perhaps, to dissuade the State from opposing the decisions at issue. DOE has, itself, acknowledged the legitimacy of the State's presumed view that commitments had been made to it not to transfer surplus plutonium to SRS unless the State received the benefits associated with location of the processing facilities in the state. *See* DOE/NNSA Report to Congress, February 2002 at 3-5,4-20,4-25,4-27 and 5-2. Presumably these benefits would be not only fiscal, but would provide some assurance that stored surplus plutonium would ultimately be removed from the state.

(Continued on following page)

storage (for up to fifty years) of Rocky Flats surplus plutonium.

Certainly the April 19, 2002 ROD contains changes from the prior RODS, which contemplated only storage pending disposition, with the presumption that at least one (if not three) disposition technology facilities would be operated at SRS.[16] In fact, the last ROD to address disposition assumed that SRS would be the location for three disposition facilities: MOX processing, immobilization, and pit disassembly and conversion. *See* January 11, 2000, Record of Decision for the Surplus Plutonium Disposition Final Environmental Impact Statement, 65 Fed. Reg. 1608 – Def. Ex. D. However, the query is not whether the planned program changed, but whether those changes present a "seriously different picture of the environmental impact of the proposed project from what was previously

---

Be that as it may, Hodges' challenge to DOE's April 19, 2002 ROD is not premised on breach of a negotiated prior ROD or agreement not to challenge an earlier EIS, as likely it cannot be. It is premised on the legal inadequacy of NEPA compliance.

[16] There have, in fact, been such a complicated series of changes in the RODS since APSF was originally approved that it is difficult to keep them straight. After considering construction of the APSF in a 1995 ROD, and relying on expansion of that building for storage of the Rocky Flats plutonium in the 1996 EIS and 1997 ROD, then approving short term use of KAMS (pending construction of ASPF) through the July 1998 SA and August 1998 ROD, DOE then issued a November 1999 EIS which based portions of its analysis on the presumption that APSF might not ever be constructed. Following that, on January 11, 2000, DOE issued another ROD which selected SRS as the site for three disposition facilities: MOX, immobilization, and pit disassembly and conversion. It was the next ROD, published on January 26, 2001, that canceled APSF, replacing it with a patchwork of facilities. The net effect of use of those facilities was, however, considered in the February 2002 SA and adopted in the April 19, 2002 ROD.

envisioned." *Hickory Neighborhood Defense League v. Skinner*, 893 F.2d 58, 63 (4th Cir. 1990). This court concludes that they do not.

DOE has shown that it specifically analyzed the potential environmental impacts of long-term storage of surplus plutonium at SRS in its 1996 EIS,1998 SA and 2002 SA. Hodges has failed to controvert DOE's detailed citations to the administrative record.

DOE notes, for instance, that the 1996 S&D EIS "analyzed the long-term storage of 'surplus' plutonium 'Pending Disposition'" with such storage to be accomplished "under both the National Academy of Science's 'Stored Weapons Standard' and DOE's 'Criteria for Safe Storage of Plutonium Metals and Oxides.'" Defendant's Reply at 4-5 (citing Def. Ex. B at S-2 to S-4). The storage standards at issue and impacts considered both addressed fifty-year periods. Defendant's Reply at 5 (citing Def. Ex. B at S-4, Def. Ex. H at 2-155 to 2-235, especially citing pages 2-166 & 2-170). This court agrees that the 1996 S&D PEIS studied long-term storage of surplus plutonium, including from Rocky Flats, for up to fifty years at SRS.[17]

Likewise DOE directs the court to specific sections of the July 1998 SA which considered the same criteria for use of KAMS for up to ten years. Defendant's Reply at 6 (citing Def. Ex. I at 2-4 and K at 1 & 3-8). As to the critical inquiry, whether the February 2002 SA considered storage

[17] At oral argument, Hodges did not appear to seriously dispute this contention or that adequate NEPA study was made of use of KAMS for at least the ten years addressed in the July 1998 SA.

of up to fifty years, despite its reference to "interim storage" and its conclusion suggesting storage of up to twenty years, DOE points the court to various portions of the SA indicating that the impacts were studied for a period of fifty years. Defendant's Reply at 7 (citing Def. Ex. K at 5-7). While the references to "interim storage" and not expecting storage to exceed twenty years present some ambiguity as to the purpose for which the February 2002 SA was prepared, this court concludes, as discussed below, that DOE clearly did consider impacts over a fifty-year period. Thus, this court cannot conclude that DOE was arbitrary and capricious in determining that a new SA or SEIS was not required to support the April 19, 2002 ROD. Likewise, as discussed below, this court finds no basis for any claim that DOE was arbitrary and capricious in determining in either the July 1998 SA or the February 2002 SA that there were no different or greater impacts relative to the 1996 S&D PEIS requiring an SEIS. Moreover, in both the 1996 EIS and 1999 EIS, DOE determined that its storage strategy was not irrevocably dependent on the selection of a particular disposition strategy at any specific time.

When DOE's actual analysis is examined, it is clear that the fifty-year impacts of storage in general, and storage at KAMS, in particular, were examined. DOE performed a comparison between storage in its APSF facility (in the 1996 EIS), and in its KAMS facility (in the 1998 and 2002 SAs), sufficient to support its conclusion that the impacts of storing this material in the KAMS facility would not be significantly different from storing it in the APSF facility for a fifty-year period.

For these reasons the court concludes that there is no genuine issue of material fact and summary judgment is

appropriate. DOE has adequately considered and disclosed the environmental impact of its actions and its decision is not arbitrary or capricious.

II. HODGES' MOTION FOR PRELIMINARY INJUNCTION

Although the court has concluded that summary judgment on Hodges' Complaint is appropriate, it also considered whether a preliminary injunction would be appropriate if there were a likelihood of success on the merits.

Traditional equity principles govern the decision to grant or deny preliminary injunctive relief under NEPA. *Sierra Club v. Marsh*, 872 F.2d 497, 503-04 (1st Cir.1989); *Florida v. Callaway*, 489 F.2d 567, 578 (5th Cir. 1974); *Public Serv. Co. of Colo. v. Andrus*, 825 F. Supp. 1483, 1504 (D. Idaho 1993) (citing *Amoco Prod. Co. v. Gambrell*, 480 U.S. 531, 542 (1987)). Traditional equity principles require a court to consider four factors before determining whether a preliminary injunction should be granted or denied: (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied, (2) the likelihood of harm to the defendant if the injunction is granted; (3) the likelihood that the plaintiff will succeed on the merits; and (4) the public interest. *See Safety-Kleen, Inc. (Pinewood) v. Wyche*, 274 F.3d 846, 858-59 (4th Cir. 2001); *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991).

A. Likelihood of Irreparable Harm to Plaintiff

The Fourth Circuit requires that a district court consider first the likelihood of irreparable harm to the

plaintiff if the preliminary injunction is denied. *See Safety-Kleen*, 274 F.3d at 859. A plaintiff must make a "clear showing" that he is likely to suffer irreparable harm if the preliminary injunction is denied. *See Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 551 (4th Cir. 1994) (internal quotations omitted). "Generally, 'irreparable injury is suffered when monetary damages are difficult to ascertain [with any accuracy] or are inadequate.'" *Id.* (citing *Danielson v. Local* 275, 479 F.2d 1033, 1037 (2d Cir. 1973)). In environmental cases, injury will often be irreparable because "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod.*, 480 U.S. at 545.

A fear of speculative or remote future injury cannot constitute irreparable harm. There must be a likelihood that immediate irreparable harm will occur. *See Manning v. Hunt*, 119 F.3d 254, 263 (4th Cir. 1997) (quoting *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir.1989) (stating that the harm demonstrated by the plaintiff must be "neither remote nor speculative, but actual and imminent")); *Direx Israel*, 952 F.2d at 815-16 (holding that where there is no likelihood within a reasonably foreseeable time that injury may occur, preliminary injunction is premature). The rule barring consideration of remote or speculative injury for purposes of a preliminary injunction applies despite the degree of injurious consequences.[18] In the Fourth Circuit, moreover,

---

[18] *See Mass. Coalition of Citizens with Disabilities v. Civil Defense Agency & Office of Emergency Preparedness*, 649 F.2d 71, 74-75 (1st Cir.

(Continued on following page)

it is especially important that a plaintiff show the current proposed stage of an action will cause irreparable injury to the environment. *See, e.g., S. C. Dept of Wildlife & Marine Resources v. Marsh,* 866 F.2d 97, 100 (4th Cir. 1989) (refusing to enjoin agency from installing generators for pump and treatment project, holding that only by operating and testing the generators would the agency be irreparably harming the environment).

A NEPA violation, if causing immediate, actual harm, however, should be considered in assessing the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied. *See North Carolina v. City of Virginia Beach*, 951 F.2d 596, 603 (4th Cir.1991) (recognizing that

---

1981) (finding specter of nuclear accident or attack by enemy power insufficient to constitute immediate irreparable harm); *New York v. NRC*, 550 F.2d 745, 756 (2d Cir. 1977) (finding that "appellant . . . failed to establish that there is any but the most remote of possibilities that an accidental crash of an airplane transporting [nuclear material] will occur or that, even if it did occur, the crash would result in the various catastrophic consequences appellant prophesies"), *superceded by rule on other grounds by Zervos v. Verizon, N. Y., Inc.*, 252 F.3d 163 (2d Cir. 2001); *Crowther v. Seaborg*, 415 F.2d 437, 438-39 (10th Cir. 1969) (finding no evidence that research project to study economic and technical feasability of using underground nuclear devices or explosives to generate natural gas was reasonably probable or reasonably likely to cause accident and therefore no irreparable harm); *Chem. Weapons Working Group, Inc. v. U.S. Dept. of the Army*, 963 F. Supp. 1083, 1095-97 (D. Utah 1997) (holding no irreparable injury where asserted risks of operation of facility for incineration of chemical warfare agents not likely). *But see Sierra Club v. Watkins*, 808 F. Supp. 852, 875-76 (D.D.C.1991) (finding risks associated with transportation of spent nuclear fuel significant until risks properly considered and warranted); *Andrus*, 825 F. Supp. at 1506-07 (finding that the uncalculated risks of repeated radiation exposure along transportation route for spent nuclear fuel along with consideration of its devastating impact irreparable harm).

Fourth Circuit decisions have "favored injunctions when a NEPA review is required and has not been conducted") (citing *Arlington Coalition on Transp. v. Volpe*, 458 F.2d 1323, 1326 (4th Cir. 1972) (enjoining highway construction pending Department of Transportation review)). Even in the NEPA context, the court must continue to balance traditional equity principles used to determine whether to grant or deny a preliminary injunction. In so doing, the court should take into account the fact that the harm created by a NEPA violation consists of the added risk to the environment that takes place when governmental decision makers make up their minds without having before them an analysis (with prior public comment) of the likely effects of their decision upon the environment. *See Sierra Club v. Marsh*, 872 F.2d 497, 500-01 (1st Cir. 1989).

Hodges claims that because DOE failed to follow the procedural requirements of NEPA, South Carolina will suffer irreparable harm without a preliminary injunction. Hodges contends that without NEPA compliance, South Carolina cannot be assured that the potentially devastating environmental effects of storing plutonium on a long-term basis at SRS have been fully considered. Plaintiff's Memorandum in Support of Motion, at 34-35. Hodges also claims irreparable harm because once the plutonium is shipped to South Carolina, it is unlikely to be removed. Hodges notes that DOE has not identified any other location that could take the plutonium. *Id.*

DOE argues that Hodges cannot show any irreparable injury. DOE asserts that procedural violations of environmental statutes alone cannot support a finding of irreparable harm. DOE also contends that Hodges must show that the alleged procedural NEPA violation would cause irreparable harm independent of the NEPA violation.

Defendant's Consolidated Memorandum, at 44. Because Hodges allegedly cannot "establish an (sic) significant risk of any appreciable injury or (2) show that DOE and other federal safety, shipping, packaging, and containment standards would be or might be inadequate" if the plutonium is shipped to SRS, DOE concludes that Hodges cannot show irreparable harm. Defendant's Consolidated Memorandum, at 45. Finally, DOE claims that Hodges has not provided any "theory by which any plant population, animal population, human population, or any other aspect of the natural environment would be harmed irreparably by long-term storage at SRS." *Id.*

The court concludes that Hodges has failed to make a clear showing of the likelihood of irreparable harm without the requested preliminary injunction. First, the court has concluded in section I above that there is no likelihood that Hodges will be able to establish a NEPA violation. Assuming, however, there were a NEPA violation, such a violation alone would not create a presumption in favor of an injunction. *See S. C. Dept. of Wildlife & Marine Resources v. Marsh*, 866 F.2d 97, 100 (4th Cir. 1989).

Hodges argues that irreparable harm is present here because once the plutonium is shipped here it will not be removed. Hodges is likely correct in concluding that, absent approval of the new MOX process,[19] once the plutonium is shipped to and stored in South Carolina,

---

[19] At oral argument, Hodges conceded that his objection was not to storage pending disposition, at least if the disposition facilities were to be located at SRS. In fact, his counsel conceded that if storage in KAMS was limited to the ten years addressed in the July 1998 SA, DOE could "bring it on." (Tr. p. 35)

changing the course of action, such as shipping and storing the plutonium at another location, is impracticable. *See, e.g.*, *Marsh*, 872 F.2d at 500-01 (stating that difficulty of changing the proposed course of action once started is a proper irreparable harm to consider on a motion for preliminary injunction); *Andrus*, 825 F. Supp. at 1505 (same). DOE has not identified any alternative location to store the plutonium. Moreover, opposition to shipment of plutonium for long-term storage without disposition to another site is reasonably likely. Such opposition would further diminish any chance the plutonium could practicably be transported and stored at another DOE facility. Thus, Hodges will suffer some harm if the court denies the preliminary injunction.

The extent of harm caused by the irreversible nature of the shipment of the Rocky Flats plutonium to SRS, however, is slight. As established at the hearing, SRS currently stores approximately two metric tons of surplus plutonium. The two tons already stored at SRS have not yet been stabilized and packaged. In contrast, Rocky Flats surplus plutonium will be stabilized and packaged at Rocky Flats before it is shipped to SRS. In fact, this process began in June 2001 in anticipation of the proposed shipments to SRS. As this court noted in its oral ruling, "It is very difficult to establish irreparable harm when the plutonium you will be receiving is obviously in a safer condition than the plutonium you already have." Tr. p. 174. Accordingly, the court concludes that Hodges has failed to make a clear showing of irreparable harm.

B. Likelihood of Harm to Defendant

After considering the likely irreparable harm to the plaintiff if the preliminary injunction is denied, the court should consider the likelihood of harm to the defendant if the preliminary injunction is granted. *See Safety-Kleen*, 274 F.3d at 859. Increased costs caused by a proposed injunction are properly considered as harm to the defendant. *See Quince Orchard Valley Citizens Assoc., Inc. v. Hodel*, 872 F.2d 75, 79 (4th Cir. 1989); *Coalition for Responsible Reg'l Dev. v. Brinegar*, 518 F.2d 522, 527 (4th Cir. 1975) (finding that delay in bridge construction increasing total cost was harm to defendant). Any adverse national security or foreign policy consequences are accorded great weight when balancing the equities of the parties. *See generally South Carolina ex rel. Campbell v. O'Leary*, 64 F.3d 892 (4th Cir. 1995).[20]

1. DOE's Arguments as to Harm to DOE Caused by Injunction

DOE argues that foreign policy and national security interests will be harmed if the court grants a preliminary injunction. DOE also claims that any delay in the immediate commencement of shipments of plutonium from Rocky Flats to SRS will cause it to incur substantial additional

---

[20] *See also Wisconsin v. Weinberger*, 745 F.2d 412, 427 (7th Cir. 1984) (considering harm to national defense one of the most important factors to be weighed); *Nat'l Res. Defense Council, Inc. v. Pena*, 972 F. Supp. 9, 20 (D.D.C. 1997) (holding national security interest paramount) (citing *Comm. for Nuclear Responsibility v. Seaborg*, 463 F.2d 796, 798 (D.C. Cir. 1971) (holding that because of "assertions of potential harm to national security and foreign policy" the court is constrained to refuse injunction despite paucity of record before it)).

costs and interfere with the important, efficient, and timely environmental clean-up at Rocky Flats.

a. Foreign Policy Interests

Insofar as foreign policy interests are concerned, DOE refers the court to the United States and Russian Federation's *Agreement . . . Concerning the Management and Disposition of Plutonium Designated As No Longer Required for Defense Purposes and Related Cooperation* (hereinafter "the U.S.-Russian Nonproliferation Agreement" or "the Agreement") where the two Parties agreed "to each dispose of 34 metric tons of plutonium pursuant to certain agreed-upon schedule and timing milestones." Defendant's Consolidated Memorandum, Ex. N (Declaration of Linton F. Brooks), ¶ 5. DOE claims that an injunction preventing DOE from immediately commencing shipments of plutonium from Rocky Flats to SRS could create the appearance "in the eyes of the Russian Federation" that the United States is uncertain about its commitment to the U.S.-Russian Nonproliferation Agreement's disposition strategy, and, in turn, call into question the Russian Federation's willingness to proceed with disposing of its own materials under the agreement. *Id.* ¶ 9. Specifically, DOE points out that both the United States and the Russian Federation decided to use MOX technology as their preferred method of disposition under the Agreement. Further, DOE notes that SRS was chosen as the DOE facility to (1) consolidate and store surplus Rocky Flats plutonium on a long-term basis subject to MOX disposition, and (2) build any applicable MOX facilities. *See id.* ¶ 9; Defendant's Consolidated Memorandum, Ex. G, at 4, 13 (2000 Agreement), and at 2, 4, 6 (1998 Agreement). Considering these nonproliferation goals of secure

storage and eventual disposition of surplus plutonium, DOE asserts that the "secure long-term storage of surplus plutonium at SRS is a practical safety and security prerequisite for any eventual disposition, under the [United States and Russian Federation's] Agreement, of all or part of that plutonium under the MOX program." Defendant's Consolidated Memorandum, at 46; Ex. A, at 3023-3024. Any significant delay in the storage part of DOE's surplus plutonium strategy could create "international uncertainty" and "kill" the Agreement by discouraging Russia from carrying out its reciprocal acts under the Agreement. Defendant's Consolidated Memorandum, at 47.

DOE points out that the United States is scheduled to begin the "excavation" of any "MOX Fuel Fabrication Facility" by October 2003. Correspondingly, the Russian Federation is scheduled to (1) complete a test-fuel line for MOX assemblies by October 2002, and (2) begin constructing an industrial-scale MOX conversion facility by July 2003. Defendant's Consolidated Memorandum, Ex. A, at 1-2 (Annex on Schedules and Milestones).

DOE submits an affidavit [sic] Linton F. Brooks, Deputy Administrator for Defense Nuclear Nonproliferation, National Nuclear Security Administration, DOE, who states that:

> actual or apparent delay in any aspect of the U.S. program, such as the uncertainty associated with a prolonged delay in the shipment of plutonium destined for the MOX program, could lead the Russian leadership to reconsider its support for the current approach. At best, this would delay the implementation of the program . . . [c]onceivably, it could kill the program because success depends on each side believing that the

> other side is in [sic] engaging in reciprocal nonproliferation efforts.

Defendant's Consolidated Memorandum, Ex. N, ¶¶ 9, 14. Ambassador Brooks further avers that the United States' failure to comply with the Agreement "would [also] call into question our commitment to other nonproliferation efforts and diminish our credibility in continuing to provide leadership on these issues internationally." *Id.* ¶ 16.

In addition, DOE emphasizes that the disposition of the Russian Federation's plutonium is "critically important to national and international security interests because it is sufficient 'to make at least 4,250 nuclear weapons.'" *Id.* ¶ 14. If the Russian Federation delayed implementation of its nonproliferation disposition strategy as a result of its uncertainty about United States compliance, then congressional funding also critical to United States compliance and the Agreement's success could be threatened. *Id.* ¶ 14

b. National Security Interests

DOE claims that consolidating surplus plutonium at SRS will help to enhance national security by decreasing the number of plutonium storage facilities and provide DOE "with the security and scale economies necessary to maximize the effectiveness of its domestic security resources." Defendant's Consolidated Memorandum, at 48 & Ex. O, ¶ 10 (quoting Affidavit of Joseph Mahaley, Director of Security for the U.S. Department of Energy). DOE urges that consolidation of surplus plutonium storage facilities is more cost-effective and efficient and "'provide[s] greater protection against the threats of theft and sabotage, both

quantitatively and qualitatively, if our security resources are focused on fewer sites.'" *Id.* ¶ 10.

c. Costs and Delay in Rocky Flats Clean-up

DOE also claims that an injunction would delay the closing and clean-up of Rocky Flats and cause substantial additional costs to be incurred. DOE estimates that closing the Rocky Flats storage facility by 2006 instead of 2010 will save approximately $440 million per year and approximately "$1.2 million per day." Defendant's Consolidated Memorandum, at 49 n.13 & Ex. Q at ¶ 18; *see also id.* Ex. I, at 1, 3, 6, 8-9, 24.

In addition, DOE stresses the importance of cleaning-up Rocky Flats by 2006. DOE states that in 1989 Rocky Flats was placed on the Superfund National Priorities List. In 1992, DOE permanently shut down nuclear weapons work at the Site. *Id.* ¶ 12. Congress and DOE then specifically selected Rocky Flats, as "the centerpiece of a newly refocused clean-up program that would concentrate on reducing public and environmental risks by 2006 . . . in order to pave the way for remaining sites."[21] Defendant's Consolidated Memorandum, Ex. Q, ¶¶ 9-10, 13. "The Rocky Flats Cleanup Agreement [moreover] establishes a legally binding relationship between DOE, EPA

[21] This selection was based on Rocky Flats' proximity to a major metropolitan area with encroaching suburbs and commercial facilities, its history as a major weapons production facility, and its enormous upkeep costs,

and the Colorado Department of Public Health and Environment that governs cleanup of the site." Defendant's Consolidated Memorandum, Ex. E, at 4-12. DOE contends that failure to remove the plutonium from Rocky Flats by November 2003 will seriously jeopardize DOE's ability to close the Rocky Flats site under the Rocky Flats Clean-up Agreement by the end of 2006. DOE specifically describes how a delay in removal of plutonium at the site could also delay "remediation of significant quantities of contamination in and around the facility where the [plutonium] is currently stored." *Id.* Ex. Q, ¶ 16.

2. Hodges' Arguments as to Harm to DOE Caused by Injunction

Hodges argues that foreign policy and national security interests are not overriding considerations in this case. Furthermore, Hodges disputes that any substantial additional costs will be incurred in the event the court grants a preliminary injunction and delays the shipment of plutonium from Rocky Flats to SRS.

a. Foreign Policy Interests

As to DOE's foreign policy interests, Hodges argues that an injunction preventing the shipment of plutonium from Rocky Flats to SRS for long-term storage will not harm the U.S. Russian Nonproliferation Agreement or any foreign policy goals for disposition of plutonium. Rather, Hodges argues that DOE's decision to ship the surplus plutonium at Rocky Flats to SRS for long-term storage without a plan for disposition actually jeopardizes national security interests. Hodges focuses on the U.S.-Russian

Nonproliferation Agreement mandate to dispose of plutonium. Hodges contends the agreement does not envision long-term storage of plutonium. Rather, because DOE has abandoned all plans to dispose of the plutonium designated for shipment to SRS, either through immobilization or MOX, Hodges contends that an injunction preventing the immediate shipment of plutonium for long-term storage at SRS will not implicate the U.S.-Russian Nonproliferation Agreement governing plutonium disposal. Plaintiff's Reply, at 22, 24-26, Ex. C. ¶ 3 (Macfarlane II); Plaintiff's Memorandum, Ex. 1, ¶ 35 (Macfarlane I).

In addition, Hodges argues that any delay in the shipment of plutonium from Rocky Flats to SRS at this time will not risk the United States' ability to comply with its plutonium disposition deadlines under the U.S.-Russian Nonproliferation Agreement. Hodges' expert, Dr. Macfarlane, avers that the U.S.-Russian Nonproliferation Agreement does not contain any schedules or deadlines for moving plutonium from one facility to another for long-term storage. Rather, Dr. Macfarlane observes that the Agreement provides "only rough milestones for the construction and operation of the disposition facilities." Plaintiff's Reply, Ex. C, ¶ 8 (Macfarlane II). Dr. Macfarlane further explains that construction of facilities to process plutonium has not begun and will not be completed and ready to process plutonium until 2006 or 2007 at the earliest. Hodges notes that DOE has yet to finalize any plan to process plutonium at all, much less to design and construct the processing facility. *Id.* ¶ 7 (citing Annexes to Agreement of the United States and the Government of the Russian Federation Concerning the Management and Disposition of Plutonium Designated as No Longer Required for Defense Purposes and Related

Cooperation, September 1, 2000). Hodges, therefore, contends that any delay in the shipment and storage of plutonium will not implicate the U.S.-Russian Nonproliferation Agreement or any U.S. foreign policy regarding disposition of plutonium.

Finally, Hodges alleges significant reasons independent of this litigation have caused delays under the U.S.-Russian Nonproliferation Agreement. Thus, Hodges argues that the reaction, if any, of the Russian Federation to a perceived delay caused by a preliminary injunction stopping shipments, would be slight. Unless the Russian Federation is able to obtain at least $2 billion dollars in the next year or so, Hodges asserts that the plutonium disposition program will be delayed. Plaintiff's Memorandum, Ex. l, ¶ 31 (citing Macfarlane I). Further, Hodges contends that the lack of an available and ready MOX fuel fabrication facility further exacerbates the Russian Federation's inability to comply with the U.S.-Russian Nonproliferation Agreement. Hodges states that last year the Russian Federation failed to realize its funding for the available and ready MOX facility it planned to buy. Since last winter, the company that owned that available and ready MOX facility has begun to decommission it. *Id.* ¶ 32. In addition, Hodges contends that disagreement between the United States and the Russian Federation over the United States' abrogation of the Antiballistic Missile Treaty and the Unites States' development of a national missile defense have made it less likely that the Russian Federation will move quickly on plutonium disposition. *Id.* Hodges submits, finally, that the United States' disposition program is in doubt. Both the Nuclear Regulatory Commission, which must license any MOX facility, and Duke Energy, the only remaining company which has agreed to

use its reactors [sic] burn the MOX fuel, have expressed doubts about DOE's current plutonium disposition program. *Id.* ¶ 33.

b. National Security Interests

Distinguishing the circumstances found in *South Carolina ex rel. Campbell v. O'Leary*, 64 F.3d 892 (4th Cir. 1995), Hodges contends that national security interests are not overriding in this case. In *O'Leary*, the Fourth Circuit reversed the district court's decision to enjoin the shipment of nuclear fuel rods that were in urgent need of shipment for foreign policy and national security reasons. At the time the case was heard, the nuclear fuel rods were already aboard ship in the Atlantic Ocean headed for the United States. Hodges asserts that similar urgent, concrete foreign policy and national security interests are not present in this case. Hodges contends that in *O'Leary DOE* had real concerns about the security of nuclear material, vulnerable to theft and sabotage while located in foreign countries and also en route across the Atlantic to the United States. In this case, however, Hodges argues that the plutonium DOE plans to ship from Rocky Flats to SRS is already under secure U.S. control. Plaintiffs Reply, at 22. Hodges asserts that the plutonium is actually more secure at Rocky Flats which has a stabilization and packaging facility to deal with potential leaks and accidents. Although Hodges recognizes that DOE has stated that packaging and stabilization facilities will be available at SRS, Hodges claims that DOE has not yet confirmed that such facilities are or will be completed in the near future. Without packaging and stabilization facilities, Hodges argues that it is not clear how DOE will safely store plutonium on a long-term basis. Plaintiff's

Memorandum, Ex. 1, ¶ 27 (Macfarlane I). Hodges also points to Dr. Macfarlane's testimony that even if all the plutonium DOE currently plans on storing at SRS by November 2003 is shipped now, allegedly to clear the way for other clean-up activities necessary to close Rocky Flats by 2006, substantial nuclear materials will remain at Rocky Flats. Plaintiff's Reply, Ex. B, ¶ 13-15. Hodges claims that if surplus plutonium remains at Rocky Flats after shipment of Rocky Flats's surplus plutonium to SRS, then surplus plutonium will not be consolidated at fewer sites and national security interests will not be enhanced.

c. Costs & Delay in Rocky Flats Clean-up

Hodges argues that substantial nuclear materials will remain at Rocky Flats even after DOE ships the proposed six metric tons of surplus plutonium to SRS. Plaintiff s Reply, Ex. C, ¶¶ 13-15 (Macfarlane II). Hodges points out that to realize substantial savings DOE must remove nearly all of its stored nuclear materials at Rocky Flats. Because substantial nuclear materials will be left at Rocky Flats after this proposed shipment, thereby preventing DOE's realization of substantial savings, Hodges argues that DOE will not incur any monetary harm if the court grants this injunction.

3. Court's Analysis of Harm to DOE if Injunction Granted

The court concludes that significant harm to DOE would result from a grant of preliminary injunctive relief. Although the court finds the most significant harm to be the inevitable delay in the close down and clean up of

Rocky Flats, the court's analysis below proceeds in the order in which the parties briefed the issues.

a. Harm to Foreign Policy Interests

Great deference is be accorded executive branch decisions regarding foreign policy and national security interests. Based upon the undisputed evidence, however, the court must view with some skepticism DOE's claim that foreign policy interests will be seriously harmed if the court grants a preliminary injunction in this case.

Perhaps the most pointed evidence contradicting DOE's claim that U.S. foreign policy interests will be harmed if the court grants the injunction in this case are DOE's own admissions to Congress. DOE acknowledged in February 2002 that a decision to consolidate surplus plutonium for long-term storage would turn the U.S.-Russian Nonproliferation Agreement on its head. In a report addressed to Congress on February 15, 2002, DOE stated:

> [The long-term storage option without disposition] does not achieve the U.S. plutonium disposition mission and it renounces the U.S.-Russian PMDA. . . . Russia would have no incentive to complete disposition of its surplus plutonium. This option would represent a reversal of the U.S. position on disposition of surplus plutonium, be derided internationally, and be opposed by states and the public.

NNSA Report, ch. 4, at 27 (report filed in response to congressional directive to Department of Energy to provide, not later than February 1, 2002, a plan for disposal of surplus defense plutonium currently located at SRS and to

be shipped to SRS in the future).[22] Considering DOE's admission to Congress, it is difficult to believe that a delay in shipping Rocky Flats surplus plutonium to SRS for long-term storage (which is what the April 19, 2002 ROD addresses) would cause great harm to the Nonproliferation Agreement.

In addition, the evidence demonstrates that delaying the shipment of plutonium at this time would not place the United States' ability to comply with its disposition deadlines under the U.S.-Russian Nonproliferation Agreement at risk. According to DOE's own latest schedule, construction of facilities to process plutonium have not yet begun and will not be completed or ready to process plutonium until 2006 or 2007 at the earliest. In fact, DOE has not yet even finalized any plan to process plutonium. Without a plan to process the plutonium designated for long-term storage at SRS at this time, it is not rational to argue that this injunction will significantly harm U.S. foreign policy interests concerned only with plutonium disposition.

---

[22] Other portions of the Report similarly stress that:

> [a] long-term storage option would renounce the existing U.S.-Russian PMDA. A storage strategy would also be viewed by Russia . . . as a reversal of a long-standing U.S. position advocating the need to disposition surplus inventories of weapons-grade plutonium. . . . and would likely put an end to Russian efforts to dispose of surplus Russian plutonium. Renouncing the PMDA is also likely to have negative secondary impacts on key aspects of other U.S.-Russian nonproliferation programs, such as monitoring and inspection of the Mayak Fissile Material Storage Facility, the Trilateral Initiative, and cooperation on Materials Protection and Control efforts.

NNSA Report, ch. 4, at 27, ch. 5, at 2.

However, because the court is required to defer to Ambassador Brooks' conclusion that such an injunction would likely cause some potential, adverse impact on the Russian Federation's *perception* of U.S. compliance with the U.S.-Russian Nonproliferation Agreement, the court does find that some harm to foreign policy interests could result from the grant of an injunction.

b. Harm to National Security

DOE argues that consolidation of surplus plutonium would enhance national security by making it more cost-effective and efficient, and also reducing the number of potential enemy targets. Consolidation of surplus plutonium would appear, as DOE contends, to "provide *greater* protection against the threats of theft and sabotage, both quantitatively and qualitatively, if our security resources are focused on fewer sites." Defendant's Memorandum, Ex. N, at 10. (emphasis added).

Dr. Macfarlane, however, suggests that even if all the plutonium DOE currently plans on storing at SRS is shipped by November 2003, substantial nuclear materials will remain at Rocky Flats. Plaintiff's Reply, Ex. B ¶ 13-15 (Macfarlane II). This contention was fully aired at the hearing, and the court finds that there is no support for Dr. Macfarlane's unsupported speculation that substantial nuclear materials will remain at Rocky Flats after November 2003. In fact, Hodges did not challenge the testimony of Paul Golan, Chief Operating Officer, Environmental Management, DOE, that substantial nuclear materials will not remain at Rocky Flats after November 2003. Apparently Dr. Macfarlane was under the impression that the current amount of surplus plutonium at

Rocky Flats exceeds the six metric tons to be shipped to SRS. Golan's testimony demonstrated that this is an incorrect impression.[23]

An additional national security consideration is the disruption to the country's weapons transportation schedule which would occur if a delay in surplus plutonium shipments occurs. *See* Affidavit of Everett H. Beckner (addressing nation's "Secure Transportation Asset" (STA) capabilities). Def. Ex. P at §§ 9-16. Beckner's affidavit establishes that any delay will cause disruption beyond simply the transport of the Rocky Flats plutonium: the longer the delay, the greater the disruption. Hodges offers no evidence to the contrary. In addition, Mr. Golan testified at the hearing that further delay in implementation of the schedule of shipments will impact required transportation of national defense shipments. (Tr. 122-23).

c. Substantial Additional Costs and Delay in Rocky Flats Clean-up

A delay in the shut down and clean-up of Rocky Flats is likely to cause DOE substantial additional costs. Jessie Hill Roberson, Assistant Secretary for Environmental Management, attests that the process of shutting down and cleaning up of Rocky Flats by 2006 will likely save approximately $440 million per year, or about $1.2 million

---

[23] According to Golan, the only plutonium which will remain after the shipment of the surplus weapons-grade plutonium to SRS is plutonium which will be removed as contamination or waste. Tr. 113-114 & 123-24.

per day. Defendant's Consolidated Memorandum, Ex. Q, ¶ 18.

The court finds that a delay in the shut down and clean-up of Rocky Flats is the most significant harm to DOE in this case. Clearly, DOE is bound to clean up Rocky Flats on a timetable. *Id.* ¶¶ 9-10, 12-13, 16, 18; Ex. E, at 4-12. Any delay in removing the plutonium is likely to delay closing down and cleaning up the site. Granting an injunction in this case would, therefore, harm DOE's ability to meet its obligations both within its financial and time constraints.

d. Disruption of Planned Activities at SRS

Based on the testimony of Allen Gunter of SRS, as well as information on upgrades of SRS facilities in the February 2002 SA, the court finds that substantial preparations in terms of facilities and manpower have been made at SRS. The court finds that an injunction would alter SRS's scheduled activities to some extent, causing some degree of disruption to DOE.

e. Conclusion as to Harm to Defendant

Based on the undisputed evidence, therefore, the court concludes that the harms to DOE if an injunction is granted are significant. Such harms include adverse national security and foreign policy consequences.

C. Balance of Harms to Parties

After identifying the likelihood of harm to the parties if the preliminary injunction is granted or denied, the court should then determine whether the balance of harm "tips decidedly in favor of the plaintiff," tips in favor of the defendant, or is about equal. *See Safety-Kleen*, 274 F.3d at 859 (citing *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 195 (4th Cir. 1977)); *see also Direx Israel*, 952 F.2d at 817. When balancing monetary costs against the loss to the human environment and general public, the Fourth Circuit has upheld a district court's finding that environmental harm overrides monetary harm. *See S. C. Dept. of Wildlife & Marine Resources*, 866 F.2d at 100 (finding district court did not clearly err in concluding that the potential harm to the defendant from an injunction, which would be substantially higher costs, "by no means equates to the loss the environment and general public will suffer if the fisheries at the [Dam] are lost"); *see also Sierra Club v. Marsh*, 714 F. Supp. 539, 592 (D. Me 1989) (finding that harm of NEPA violation outweighed substantial increased costs of injunction), *amended on other grounds by* 744 F. Supp. 352 (D. Me. Nov. 1, 1989), *aff'd*, 976 F.2d 763 (1st Cir. 1992).

For the reasons discussed above, the court finds that the likelihood Hodges will suffer irreparable harm if the court denies the preliminary injunction is low. The court assigns some weight to Hodges' contention that DOE's decision to store plutonium in South Carolina on a long-term basis without any plan for disposition would cause irreparable harm, at least to the extent that it is possible the plutonium might never be processed and removed. In addition, because DOE is making decisions regarding nuclear materials with potentially devastating and deadly

consequences, the court recognizes the heightened importance of ensuring that DOE complies with NEPA before taking action.

On the other hand, for the reasons set forth above, DOE has established that foreign policy and national security interests could be harmed by an injunction. Further, DOE has demonstrated that a delay in the shipment of plutonium from Rocky Flats to SRS would likely cause DOE to lose substantial additional cost savings, and would likely interfere with DOE's ability to meet its legally binding deadline to clean up Rocky Flats. A delay would constrain DOE's ability to complete the clean-up with the money Congress appropriated for this environmentally significant project.

After balancing the harms to the parties, the court concludes that the harms to DOE outweigh the harm to Hodges even if a NEPA violation were present. It should be noted that the shipment schedule encompasses an eighteen month period. Should a NEPA violation be found by a reviewing court within the next few months, only a small percentage of the shipments will have occurred. Considering that SRS already stores approximately two metric tons of unstabilized plutonium, it is difficult to conclude that the harm to Hodges from the arrival of a few shipments of stabilized plutonium warrants an urgent need for a preliminary injunction pending final review of the NEPA issue.

D. Likelihood of Success on the Merits

For the reasons set forth in Section I above the court concludes that Hodges is unable to establish that he is likely to succeed on the merits. Because Hodges has failed

to make a clear showing of irreparable harm, he must establish by clear and convincing evidence that he is likely to succeed on the merits. This he cannot do. Thus even if a "substantial question" were presented, *Smyth v. Rivero*, 282 F.3d 268,276 (4th Cir. 2002) (citing *Safety-Kleen*, 274 F.3d at 859), this court would deny the motion for preliminary injunction due to the failure of Hodges to make a clear showing of irreparable harm.

E. Public Interest

The public interest is the final factor to consider in determining whether to grant or deny a preliminary injunction. Generally, the public interest is best served when an injunction is granted in favor of the party suffering the most harm by the denial or grant of the injunction. *See, e.g., Wisconsin v. Weinberger*, 745 F.2d 412, 426 (7th Cir. 1984) (finding that even if there had been a NEPA violation, traditional equity principles militated against granting preliminary injunction because potential harm to Navy and national defense outweighed harm to the environment).

F. The Equitable Balance

After considering each factor separately, the court must consider the equitable balance of the factors construed together. *See Ciena Corp. V. Jarrard*, 203 F.3d 312, 323 (4th Cir. 2000) (stating that "once a court has performed these separate analyses, it must then make the equitable determination whether to grant injunctive relief"). Considering the findings above, and that interim relief is "an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in

limited circumstances which clearly demand it," *Direx Israel*, 952 F.2d at 811 (internal quotations omitted), the court concludes that a preliminary injunction is unwarranted.

CONCLUSION

IT IS THEREFORE ORDERED that DOE's motion for summary judgment is **GRANTED** and Hodges' motion for a preliminary injunction is **DENIED.**

IT IS SO ORDERED.

/s/ Cameron McGowan Currie
CAMERON MCGOWAN CURRIE
UNITED STATES
DISTRICT JUDGE

Columbia, South Carolina
June 17, 2002

STATUTES AND REGULATIONS INVOLVED

42 U.S.C § 4332, Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall –

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on –

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

---

42 U.S.C § 4334, Other statutory obligations of agencies

Nothing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

National Defense Authorization Act of Fiscal Year 2002, Pub. L. No. 107-107, § 3155, Disposition of Surplus Defense Plutonium at Savannah River Site, Aiken, South Carolina.

(a) CONSULTATION REQUIRED. – The Secretary of Energy shall consult with the Governor of the State of South Carolina regarding any decisions or plans of the Secretary related to the disposition of surplus defense plutonium and defense plutonium materials located at the Savannah River Site, Aiken, South Carolina.

(b) NOTICE REQUIRED. – For each shipment of defense plutonium or defense plutonium materials to the Savannah River Site, the Secretary shall, not less than 30 days

before the commencement of such shipment, submit to the congressional defense committees a report providing notice of such shipment.

(c) PLAN FOR DISPOSITION. – The Secretary shall prepare a plan for disposal of the surplus defense plutonium and defense plutonium materials currently located at the Savannah River Site and for disposal of defense plutonium and defense plutonium materials to be shipped to the Savannah River Site in the future. The plan shall include the following:

(1) A review of each option considered for such disposal.

(2) An identification of the preferred option for such disposal.

(3) With respect to the facilities for such disposal that are required by the Department of Energy's Record of Decision for the Storage and Disposition of Weapons-Usable Fissile Materials Final Programmatic Environmental Impact Statement dated January 14, 1997 –

(A) a statement of the cost of construction and operation of such facilities;

(B) a schedule for the expeditious construction of such facilities, including milestones; and

(C) a firm schedule for funding the cost of such facilities.

(4) A specification of the means by which all such defense plutonium and defense plutonium materials will be removed in a timely manner from the Savannah River Site for storage or disposal elsewhere.

(d) PLAN FOR ALTERNATIVE DISPOSITION. – If the Secretary determines not to proceed at the Savannah

River Site with construction of the plutonium immobilization plant, or with the mixed oxide fuel fabrication facility, the Secretary shall prepare a plan that identifies a disposition path for all defense plutonium and defense plutonium materials that would otherwise have been disposed of at such plant or such facility, as applicable.

(e) SUBMISSION OF PLANS. – Not later than February 1, 2002, the Secretary shall submit to Congress the plan required by subsection (c) (and the plan prepared under subsection (d), if applicable).

(f) LIMITATION ON PLUTONIUM SHIPMENTS. – If the Secretary does not submit to Congress the plan required by subsection (c) (and the plan prepared under subsection (d), if applicable) by February 1, 2002, the Secretary shall be prohibited from shipping defense plutonium or defense plutonium materials to the Savannah River Site during the period beginning on February 1, 2002, and ending on the date on which such plans are submitted to Congress.

(g) RULE OF CONSTRUCTION. – Nothing in this section may be construed to prohibit or limit the Secretary from shipping defense plutonium or defense plutonium materials to sites other than the Savannah River Site during the period referred to in subsection (f) or any other period.

(h) ANNUAL REPORT ON FUNDING FOR FISSILE MATERIALS DISPOSITION ACTIVITIES. – The Secretary shall include with the budget justification materials submitted to Congress in support of the Department of Energy budget for each fiscal year (as submitted with the budget of the President under section 1105(a) of title 31, United States Code) a report setting forth the extent to which amounts requested for the Department for such fiscal year for fissile materials disposition activities will

enable the Department to meet commitments for the disposition of surplus defense plutonium and defense plutonium materials located at the Savannah River Site, and for any other fissile materials disposition activities, in such fiscal year.

---

10 C.F.R. § 1021.104, Definitions.

(a) The definitions set forth in 40 CFR part 1508 are referenced and used in this part.

(b) In addition to the terms defined in 40 CFR part 1508, the following definitions apply to this part:

* * *

Categorical exclusion means a category of actions, as defined at 40 CFR 1508.4 and listed in appendix A or B to subpart D of this part, for which neither an EA nor an EIS is normally required.

* * *

EA means an environmental assessment as defined at 40 CFR 1508.9.

EIS means an environmental impact statement as defined at 40 CFR 1508.11, or, unless this part specifically provides otherwise, a Supplemental EIS.

* * *

FONSI means a Finding of No Significant Impact as defined at 40 CFR 1508.13.

* * *

NEPA document means a DOE NOI, EIS, ROD, EA, FONSI, or any other document prepared pursuant to a requirement of NEPA or the CEQ Regulations.

* * *

Programmatic NEPA document means a broad-scope EIS or EA that identifies and assesses the environmental impacts of a DOE program; it may also refer to an associated NEPA document, such as an NOI, ROD, or FONSI.

* * *

Supplement Analysis means a DOE document used to determine whether a supplemental EIS should be prepared pursuant to 40 CFR 1502.9(c), or to support a decision to prepare a new EIS.

Supplemental EIS means an EIS prepared to supplement a prior EIS as provided at

* * *

---

10 C.F.R. § 1021.210, DOE decisionmaking.

* * *

(b) DOE shall complete its NEPA review for each DOE proposal before making a decision on the proposal (e.g., normally in advance of, and for use in reaching, a decision to proceed with detailed design), except as provided in 40 CFR 1506.1 and §§ 1021.211 and 1021.216 of this part.

---

10 C.F.R. § 1021.314, Supplemental environmental impact statements.

(a) DOE shall prepare a supplemental EIS if there are substantial changes to the proposal or significant new circumstances or information relevant to environmental concerns, as discussed in 40 CFR 1502.9(c)(1).

(b) DOE may supplement a draft EIS or final EIS at any time, to further the purposes of NEPA, in accordance with 40 CFR 1502.9(c)(2).

(c) When it is unclear whether or not an EIS supplement is required, DOE shall prepare a Supplement Analysis.

(1) The Supplement Analysis shall discuss the circumstances that are pertinent to deciding whether to prepare a supplemental EIS, pursuant to 40 CFR 1502.9(c).

(2) The Supplement Analysis shall contain sufficient information for DOE to determine whether:

(i) An existing EIS should be supplemented;

(ii) A new EIS should be prepared; or

(iii) No further NEPA documentation is required.

---

10 C.F.R. § 1021.321, Requirements for environmental assessments.

(a) When to prepare an EA. As required by 40 CFR 1501.4(b), DOE shall prepare an EA for a proposed DOE action that is described in the classes of actions listed in appendix C to subpart D of this part, and for a proposed DOE action that is not described in any of the classes of

actions listed in appendices A, B, or D to subpart D, except that an EA is not required if DOE has decided to prepare an EIS. DOE may prepare an EA on any action at any time in order to assist agency planning and decisionmaking.

(b) Purposes. A DOE EA shall serve the purposes identified in 40 CFR 1508.9(a), which include providing sufficient evidence and analysis for determining whether to prepare an EIS or to issue a FONSI. If appropriate, a DOE EA shall also include any floodplain/wetlands assessment prepared under 10 CFR part 1022 and may include analyses needed for other environmental determinations.

(c) Content. A DOE EA shall comply with the requirements found at 40 CFR 1508.9. In addition to any other alternatives, DOE shall assess the no action alternative in an EA, even when the proposed action is specifically required by legislation or a court order.

---

10 C.F.R. § 1021.322, Findings of no significant impact.

(a) DOE shall prepare a FONSI only if the related EA supports the finding that the proposed action will not have a significant effect on the human environment. If a required DOE EA does not support a FONSI, DOE shall prepare an EIS and issue a ROD before taking action on the proposal addressed by the EA, except as permitted under 40 CFR 1506.1 and § 1021.211 of this part.

---

10 C.F.R. § 1021.400(d)

If a DOE proposal is not encompassed within the classes of actions listed in the appendices to this subpart D, or if there are extraordinary circumstances related to the proposal that may affect the significance of the environmental effects of the proposal, DOE shall either:

(1) Prepare an EA and, on the basis of that EA, determine whether to prepare an EIS or a FONSI; or

(2) Prepare an EIS and ROD.

---

10 C.F.R. § 1021.410, Application of categorical exclusions (classes of actions that normally do not require EAs or EISs).

(a) The actions listed in appendices A and B to this subpart D are classes of actions that DOE has determined do not individually or cumulatively have a significant effect on the human environment (categorical exclusions).

---

10 C.F.R. Pt. 1021, Subpt. D, App. D, Classes of Actions That Normally Require EISs

Table of Contents

* * *

D10 Siting/construction/operation/decommissioning of major treatment, storage, and disposal facilities for high-level waste and spent nuclear fuel

* * *

---

40 C.F.R. § 1508.4, Categorical exclusion.

"Categorical Exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

---

40 C.F.R. § 1508.9, Environmental assessment

"Environmental Assessment":

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by sec. 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

---

40 C.F.R. § 1508.13, Finding of no significant impact.

"Finding of No Significant Impact" means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

[LOGO]

The Secretary of Energy
Washington, DC 20585

April 11, 2002

The Honorable Jim Hodges
Governor
State of South Carolina
P.O. Box 11829
Columbia, SC 29211

Dear Governor Hodges:

I am writing in response to your letter of last night. I must say I was surprised and disappointed that my attempt yesterday to propose a solution to our negotiations and ask for your views was met by a response that seemed to reflect no awareness of what I had proposed and that instead claimed that the Department had made no effort to address the issues we have spent the last month trying to resolve.

In case this is somehow the result of confusion or miscommunication, I thought I should communicate to you personally, formally and in writing what I am proposing. When you have had the opportunity to review this letter and the attached material, I hope you will agree that the Department has gone the extra mile in this matter to completely address all the concerns raised by South Carolina while at the same time meet our nation's international and domestic commitments.

To that end, I have attached to this letter the text of a final agreement that contains all the provisions that the Department and South Carolina have been discussing. I have signed this agreement. I hope you will as well. I am

also sending you the text of an amended Record of Decision formally stating the decisions the Department would make if we do reach agreement. I am prepared to authorize issuance of this Record of Decision immediately upon receiving a signed agreement from you.

As we come to this crucial decision point, it is important to recall how we got here. The United States and the Russian Federation have agreed, under the September 2000 *U.S.-Russian Plutonium Management and Disposition* Agreement, to each dispose of 34 metric tons of plutonium, enough to make over 4,200 nuclear weapons. The previous Administration formulated a plan for implementing this agreement through the construction of three facilities at the Savannah River Site: a Mixed Oxide (MOX) Fuel Fabrication Facility, a Pit Disassembly and Conversion Facility, and an Immobilization Facility. Under the prior Administration's plan, there were no commitments of any kind to the State of South Carolina limiting the amount of plutonium brought into the State, obligating the Federal government to remove that material if future plans charged, or providing for any commitment of out-year funding for the program.

When President George W. Bush took office, we undertook a major review of all non-proliferation programs with Russia, including the plutonium disposition program. As a result of that review, we concluded that we should eliminate the Immobilization Facility. This would preserve the MOX component needed to induce the Russian Federation to move forward with its own decommissioning program; save nearly $2 billion dollars; reduce technical risk; and speed up the program by three years, all while preserving the non-proliferation benefits to the world and the economic benefits to South Carolina.

While our review was in progress, you stated that South Carolina would not accept any plutonium shipments without assurances that there was a clear pathway out of the State should our revised program not come to fruition. This position not only called into question our ability to carry out the disposition program; it also jeopardized cleanup activities in other states. As we have made clear many times, we are committed to close the Rocky Flats site in 2006. Doing so requires us to begin shipments of plutonium to Savannah River in the near future, well in advance of the construction of the MOX Fuel Fabrication Facility. Savings from the Rocky Flats closure will be used to fund additional cleanup activities at Savannah River and other sites.

As I have indicated in our various personal meetings and phone conversations, I appreciate your concerns that any plutonium that comes into the State have a credible pathway out. That is why when we spoke on February 26, I personally assured you that our new approach would not transport any plutonium to South Carolina unless our plans for fabricating it into MOX fuel were progressing in a fashion that assured that it would be able to be disposed of through this process. In further support of this position and to be responsive to your stated requests, the President included $384 million to fully fund the plutonium disposition program in the fiscal year 2003 budget. That budget also specifically noted that the project would require funding of $3.8 billion over 20 years, thereby signaling the Office of Management and Budget's commitment to the program well beyond just this upcoming fiscal year. We have also made our commitment to the program clear in every possible forum, public and private, national and international.

Because we understand that the program will extend for decades, we have gone even further. Specifically, we have included in the proposed agreement terms developed through negotiations with your staff to guide the program in the future, including the following firm commitments:

1. A commitment to construct two facilities at SRS, including milestones;

2. A commitment by the Department of Energy, backed up by language in the President's FY03 budget, to request all needed funds to carry out this program at Savannah River (estimated to be $3.8 billion over 20 years);

3. The establishment of annual funding targets;

4. A commitment to notify the State of all plutonium shipments into South Carolina; and

5. A commitment to maintain a pathway out of South Carolina for any plutonium brought into the State, including firm dates by which such material would be removed from the State if DOE, for any reason, were to be unable to secure the funding necessary to build the MOX facility.

Despite our efforts to meet the State's concerns, those concerns keep changing. The State expressed concern that we might build the facility and then not use it; we took that into account in the agreement. The State became concerned about the rate of removal; we specified that in the agreement. The State became concerned about future funding; we accommodated that in the agreement. The State became concerned with enforceability. At first I believed that it would be impossible to address this concern, since the Executive Branch cannot waive the Constitutional sovereign immunity of the United States. Because,

however, we sought to go the extra mile to meet the State's needs, we devised a unique legal strategy to make the agreement an integral element of the formal Record of Decision, enforceable pursuant to the National Environmental Policy Act. The State then suggested inclusion of additional language stating that any change to the agreement would be a material change in the program. We have included that as well.

Despite even this effort the State has contended that it does not believe such an approach would be sufficiently enforceable. Consequently, the State suggested legislation as an additional enforcement mechanism. Notwithstanding our belief that the aforementioned approaches would satisfactorily permit the enforcement of our agreement, we are also prepared to support a legislative fix as well. To that end, the agreement I am forwarding you contains a legislative proposal that specifically requires the Department to remove all plutonium brought to Savannah River after April 15, 2002 if the MOX facility is not built and operating on schedule. The Department is fully prepared to support this proposal as the final piece of this agreement, provided that the State is willing to do so as well.

Finally, the State has expressed concern about what will happen if legislation is not enacted before the congress adjourns. Let me say that I firmly believe that if we and the State join hands and work together to promote this legislative solution, we can succeed in achieving it. Nevertheless, to accommodate this concern, I have included in the agreement I am transmitting a commitment that the department will move no more than 3.2 metric tons of plutonium into the State before October 15, 2002 – the amount suggested by the State. At that juncture, if legislation has not been enacted by that time, we will halt

shipments and immediately begin working with South Carolina and Colorado to determine an alternative path forward. And, as I have repeatedly assured you, no plutonium will move into the State of South Carolina without a pathway for that plutonium to come out.

In short, I believe we have gone to extraordinary lengths to endeavor to accommodate your concerns on every point. I believe we have succeeded.

It is now time to bring this process to a close. Further delay in reaching agreement will undermine important international and domestic priorities of the United States. First, it will undermine the U.S. plutonium disposition agreement with Russia. We need to move forward with the MOX plant that will be used to dispose of the plutonium at issue in order to honor our commitments to the Russian Federation. That will be very difficult to do in the face of potential litigation from the Governor of the State where the plant is to be located. Second, as I noted earlier, our inability to reach agreement is also jeopardizing cleanup activities across the nation. In particular, a continued impasse will also directly cause the closure of Rocky Flats to slip past 2006.

Accordingly, as noted, I am enclosing a signed copy of our agreement and a draft amended Record of Decision that incorporates that agreement by reference. I urge you to sign the agreement, after which I will formally issue the Record of Decision and authorize the issuance of a 30-day notice of our intent to begin shipping surplus plutonium from the Rocky Flats Site immediately thereafter.

If you are unable to accept this agreement, I will proceed to take the steps I believe necessary to meet our national security and environmental cleanup objectives.

Consistent with applicable law, on April 15, I will authorize issuance of an amended Record of Decision that does not incorporate the terms of the attached agreement and will direct issuance of the requisite a 30-day notice of our intent to begin shipping.

I believe reaching agreement and moving ahead now is in the best interests of the people of South Carolina, of the dedicated workers at the Savannah River Site, of our long-term environmental clean up efforts, and of the important cause of international stability and nuclear nonproliferation. I hope you will agree. Please call me if you have any questions about this matter.

Sincerely,

/s/ Spencer Abraham

Enclosure

AGREEMENT

The Department of Energy (hereinafter "DOE"), acting through the Secretary of Energy and the State of South Carolina (hereinafter "South Carolina"), acting through its Governor (hereinafter "the parties") enter into this AGREEMENT to facilitate the shipment into South Carolina and the disposition of weapons-usable plutonium (hereinafter "plutonium").

WHEREAS, there is an overriding national security interest in disposing of surplus plutonium in a prompt, effective, and safe manner;

WHEREAS, DOE intends to dispose of 34 metric tons of plutonium by the end of 2019, through the conversion of the material to a mixed-oxide fuel (MOX) for use in commercial nuclear power reactors; and

WHEREAS, the plutonium disposition program is necessary for DOE to remediate its former weapons production sites, including the Savannah River Site, in a safe, expeditious and cost effective manner, and

WHEREAS, the State of South Carolina has a legitimate interest in assuring itself, on behalf of its citizens, that there is a clear disposition path for weapons-usable plutonium sent to the Savannah River Site;

THEREFORE, the parties have agreed as follows:

DOE will transfer no plutonium to the Savannah River Site without a clear path out of South Carolina ("The State"). Further, if DOE fails to adhere to the construction, disposition and all other milestones contained herein, DOE will, unless otherwise agreed to by South Carolina, immediately cease further shipments of plutonium to South Carolina. Further, under certain provisions set forth below, DOE will package and remove any plutonium sent to South Carolina under this Agreement.

PLUTONIUM DISPOSITION FACILITIES

DOE intends to construct two major facilities at the Savannah River Site in South Carolina: a MOX Fuel Fabrication Facility (FFF), to be in operation by July 2007, and a Pit Disassembly and Conversion Facility (PDCF), to be in operation by October 2009.

DOE will:

Complete the design of the MOX FFF by September 30, 2003.

Begin construction of the MOX FFF by March 30, 2004. The MOX FFF will be commissioned for operations by July 30, 2007.

Begin the removal of plutonium from Savannah River Site by initial shipments of MOX fuel to commercial nuclear reactors by September 30, 2008.

Begin construction of the PDCF by March 31, 2007 and start up of the facility by September 30, 2009.

The attached funding plan sets forth the funding necessary to construct the MOX FFF. If annual appropriations enacted by Congress are below the amount listed in this plan by twenty percent in any given year, DOE will cease all shipments of plutonium destined for the MOX FFF to the Savannah River Site. Unless the Parties agree otherwise, shipments may resume if, and only if, the subsequent year's appropriations restore the funding set forth in the attached plan.

REMOVAL OF MATERIAL FROM SOUTH CAROLINA

In the event that unforeseen technical, fiscal, international, legal or other circumstances preclude completion of the MOX FFF, DOE will promptly notify South Carolina of the event precluding DOE's compliance, will immediately cease all shipments of plutonium intended for disposition through the MOX facility to the Savannah River Site, and

will initiate discussions with South Carolina to reach agreement on appropriate adjustments to the commitments made in the AGREEMENT, consistent with its spirit and intent.

> For purposes of this AGREEMENT, if enacted funding for MOX FFF is below the amount listed in the attached plan by twenty percent in each of two successive years, the Parties shall consider this reduced funding as precluding completion of the MOX FFF.
>
> For purposes of this AGREEMENT, the Parties shall consider a delay in completion of the MOX FFF by more than eighteen months as precluding completion of the MOX FFF. Delays of less than one year shall not be so considered.

DOE will identify an alternative path for disposition satisfactory to South Carolina or DOE will begin packaging for removal from the state plutonium equal to the amount brought to Savannah River Site after the date of this agreement and intended for disposition through the MOX facility in any of the following circumstances:

> If unforeseen technical, fiscal, international, legal or other circumstances preclude completion of the MOX FFF, and the discussions referred to above do not result in agreement on appropriate adjustments to the commitments made in this AGREEMENT.
>
> If, in any eighteen month period beginning after the end of the first full calendar year after initial operation of the MOX Fuel Fabrication Facility, less than one metric ton of plutonium is processed through the MOX facility.

DOE will remove the material packaged as indicated above from South Carolina in compliance with the provisions of the National Environmental Policy Act on an expeditious schedule that recognizes any legal restrictions on or technical limitations of other locations where the material could be shipped for storage. At least one ton will be removed within two years and all material will be removed within no more than eight years.

DOE's obligations to remove material from Savannah River Site shall be subject to the provision of the necessary funding by the Congress. DOE will make every effort to ensure the necessary funding is appropriated, including the use of reprogramming if necessary.

The parties agree to support legislation including the following provisions:

> "If the MOX Fuel Fabrication Facility is not producing at least one metric ton of MOX per year by January 1, 2009, the Secretary of Energy shall, consistent with the NEPA and other governing laws and subject to the availability of appropriations, remove at least one ton of weapons-usable plutonium by January 1, 2011, and shall remove an amount of weapons-usable plutonium equal to the amount of weapons usable-plutonium transferred to the Savannah River Site after April 15, 2002 by January 1, 2017."

If such legislation is not enacted by October 15, 2002, DOE will halt plutonium shipments and the parties will immediately consult to determine an alternative path forward.

SHIPMENT OF MATERIALS

DOE will provide South Carolina notice of shipments of plutonium to the Savannah River Site at least thirty days in advance of such shipments, unless South Carolina and DOE agree otherwise. For security reasons, DOE will not provide exact dates or routes of the shipments.

Shipments will be subject to the following restrictions:

DOE may ship no more than six metric tons of plutonium, consisting of all the plutonium now located at Rocky Flats, Colorado, to Savannah River Site beginning no sooner than 30 days after the appropriate notice is provided to South Carolina and continuing in an efficient and uninterrupted manner.

DOE may ship no more than one-half metric tone of material from the Lawrence Livermore National Laboratory, Livermore, California to Savannah River site beginning no sooner than 30 days after the appropriate notice is provided to South Carolina and continuing in an efficient and uninterrupted manner. DOE will only ship material as necessary to make room for comparable amounts of material coming to the Lawrence Livermore National Laboratory from Rocky Flats, Colorado. The total material shipped from Rocky Flats Colorado and the Lawrence Livermore National Laboratory under these provisions shall not exceed six metric tons.

No more than 3.2 metric tons will be shipped before October 15, 2002.

Except by prior agreement with South Carolina, DOE will make no other shipments of plutonium until one year prior to the scheduled completion of construction of the MOX FFF and

in no case prior to July 1, 2006. Prior to making any shipments after July 1, 2006, DOE will certify to South Carolina that construction of the MOX FFF remains on schedule.

DOE will make no shipments of "pits" (classified components of nuclear weapons) now located at the PANTEX Facility in Amarillo, Texas until twelve months prior to the scheduled start up of the PDCF. Ongoing shipments of this material will be at a rate commensurate with the disposition rate through the PDCF.

Provided that the provisions of this AGREEMENT are being met South Carolina agrees that it will not pose any objections, now or in the future, or interfere with any shipments made in accordance with the provisions of this AGREEMENT.

MISCELLANEOUS PROVISIONS

DOE acknowledges that the K-Reactor is not intended for use as a long-term storage facility. DOE agrees not to use K-reactor for storage of plutonium beyond that required in support of the MOX FFF without the agreement of South Carolina.

DOE will arrange to process requests by appropriate South Carolina officials for DOE security clearance ("Q clearance") on an accelerated basis in order to allow monitoring of data relating to plutonium shipments.

The parties acknowledge that acts addressed by this agreement are agreed to subject to the provisions of the National Environmental Policy Act and other governing laws and shall be taken in accordance with those laws.

NOTICE

Any formal communication, to DOE under this AGREEMENT shall be provided to the Manager, Savannah River Site:

Manager,
U.S. Department of Energy
Savannah River Site
Building 703A
Aiken, South Carolina 29808

Any formal communication to South Carolina under this AGREEMENT shall be provided to:

Governor of South Carolina
State House, 1st Floor
P.O. Box 11829
Columbia, South Carolina 29201

EFFECTIVE DATE

This AGREEMENT shall be effective upon signature by the parties.

Done on April 11, 2002 in the cities of Washington D.C. and Columbia, South Carolina.

For the Department of Energy	For the State of South Carolina
/s/ Spencer Abraham	/s/
Spencer Abraham	Jim Hodges

Attachment

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

John T. Conway, Chairman
A.J. Eggenberger, Vice Chairman
Joseph J. DiNunno
John E. Mansfield

(LOGO)

625 Indiana Avenue, NW, Suite 700,
Washington, D.C. 20004-2901
(202) 694-7000

November 21, 2001

The Honorable Spencer Abraham
Secretary of Energy
1000 Independence Avenue, SW
Washington, DC 20585-1000

Dear Secretary Abraham:

The Defense Nuclear Facilities Safety Board (Board) appreciated the November 8, 2001, briefing regarding the nuclear materials stabilization programs provided by the Department of Energy's (DOE) Office of Environmental Management (EM) and National Nuclear Security Administration (NNSA). These stabilization programs have been undertaken by DOE in response to the Board's Recommendation 94-1, *Improved Schedule for Remediation in the Defense Nuclear Facilities Complex*, and Recommendation 2000-1, *Prioritization for Stabilizing Nuclear Materials*.

The Board requested this briefing in a letter dated March 23, 2001, which also established reporting requirements regarding the stabilization programs at the Savannah River Site (SRS) and Los Alamos National Laboratory (LANL). DOE's written response to the reporting requirements was provided to the Board on September 19, 2001.

The Board understands that DOE is currently preparing a revision to the January 19, 2001, Implementation Plan for Recommendations 94-1 and 2000-1. As discussed with the representatives from DOE-EM and NNSA on November 8, 2001, the Board has several suggestions concerning the revised Implementation Plan.

Savannah River Site. The present plan to install equipment in FB-Line to stabilize and package plutonium metals and oxides in accordance with DOE-STD-3013, *Stabilization, Packaging, and Storage of Plutonium-Bearing Materials*, represents the most expeditious means of completing this packaging effort at SRS. During visits to SRS in July and November 2001, the Board discussed stabilization and packaging issues with site personnel. On the basis of those discussions and review of conceptual design information, the Board believes the revised implementation Plan should include the following attributes:

- Stabilization and packaging of plutonium metal should be addressed by commitments separate from those related to plutonium oxide. Because the existing plutonium metal items at SRS are already in seal-welded inner cans, final packaging can be completed much sooner for metal items than for plutonium oxides, which require thermal stabilization and double packaging. Providing a separate, earlier commitment for packaging of plutonium metal will help preclude contamination events such as that which occurred in the FB-Line vault in September 1999. New equipment for this packaging is expected to be installed during 2002. Final packaging of plutonium metal into outer containers should be completed by mid-2003.

- All plutonium stabilization and packaging should be completed by mid-2006.

In its September 19, 2001, response to the Board's reporting requirements, DOE concluded that the possible extended storage (up to 50 years) of plutonium at SRS would not lead to any safety issues as long as the material was packaged to meet DOE-STD-3013. The Board agrees that DOE-STD-3013 is an appropriate standard for stabilization and packaging of plutonium for long-term storage. However, the K-Area Material Storage (KAMS) facility, which will be relied upon for such storage at SRS, is an aged facility and was never intended to provide more than interim storage. Maintaining KAMS for prolonged use beyond its design life could prove to be impractical.

Los Alamos National Laboratory. In December 1999, the Board informed DOE that LANL was at risk of failing to meet the Secretary's Implementation Plan commitments. Nearly 2 years later and almost 8 years after Recommendation 94-1 was issued, there is no longer a defined schedule for stabilizing LANL's excess nuclear materials. DOE's September 19, 2001, letter indicates that an integrated schedule and plan will be prepared, but does not identify overall expectations for the stabilization program or commit to a date for completing the plan. Furthermore, DOE's letter indicates that LANL is using a process hazard analysis approach to prioritize materials for processing. As explained to the Board's staff, LANL's approach would not consider attributes such as the reactivity of the material or the condition of its packaging in assigning priority for stabilization.

The Board is aware that the Office of Defense Programs (DP) is continuing to review the stabilization

program and provided supplemental funds for fiscal year (FY) 2001. While these additional funds are a positive sign for the future, they are too late to ensure continuity in the LANL stabilization program. Personnel needed for the stabilization effort have been shifted to other priority activities at LANL, and DOE's response to the reporting requirements indicates that it will take 2½ years to replace them. If this is the case, LANL's stabilization capabilities will not be fully operational until FY 2004.

The Board believes the stabilization program at LANL would be improved if the revised Implementation Plan included the following elements:

- As previously noted by the Board, the age of residues should be considered as a significant factor in establishing priorities for processing because older items are more likely to have vulnerabilities in material condition and packaging. Presently, LANL continues to process newly generated residues because they are readily available and because doing so ensures that the projects that generate the residues provide funding for their stabilization.

- LANL should pursue direct disposal of entire surplus material categories instead of evaluating each individual package as it is retrieved from the vault to determine if it will be disposed or processed to recover plutonium. During the briefing provided on November 8, 2001, DP personnel indicated that a significant portion of the FY 2001 supplemental appropriation for Recommendation 94-1 activities was being applied to long-lead items for new process lines at LANL to support chemical processing of residues for the

recovery of plutonium. These new processing capabilities will not be available for several years. Other DOE sites, notably the Rocky Flats Environmental Technology Site, have been highly successful in pursuing direct disposal of entire categories of surplus

- While developing the integrated schedule for residue stabilization, DOE should establish target milestone dates that are accelerated with respect to the January 19, 2001, Implementation Plan. The Board believes stabilization and disposition of excess residues can be reasonably achieved by 2008. Every effort should be made to accelerate that date. If the schedule cannot be accelerated to complete processing by 2006, the packaging for those materials which will remain beyond 2006 should be upgraded to comply with DOE's *Criteria for Interim Safe Storage of Plutonium Bearing Solid Materials* to better ensure safe storage.

- Excess plutonium metal and oxide should be packaged into DOE-STD-3013 containers consistent with the January 19, 2001, Implementation Plan. It would be advantageous for DOE to use outer container packaging equipment similar to that already operational at other DOE sites, rather than developing new equipment for LANL. The Board agrees that DOE's current intent to prepare an integrated plan for upgrading the material condition and packaging for both excess and programmatic plutonium metal and oxide material is appropriate. The Board believes a target date of 2006 for completion of this packaging effort would be reasonable.

- Stabilization of unsheltered containers should be reinitiated so that at least one container is processed per year, including this fiscal year – as originally committed. The Board notes that additional containers are expected to be generated in the future, and that consideration needs to be given to the associated need for an increased processing rate. While LANL's plan to weld caps on access ports on the containers would help guard against a leak to the environment, consideration should still be given to providing a filtered shelter for the containers until they can be stabilized.

The Board understands that DOE intends to submit new Implementation Plan commitments for materials stabilization at SRS by the end of 2001 and to submit commitments for LANL at a later date. The Board looks forward to receiving this information and, in the interim, urges DOE to press forward with stabilization work at those sites.

Sincerely,

/s/ John T. Conway
John T. Conway
Chairman

c: The Honorable Jessie Hill Roberson
Brigadier General Ronald J. Haeckel
Mr. Mark B. Whitaker, Jr.

TWELFTH ANNUAL REPORT
TO CONGRESS

DEFENSE NUCLEAR FACILITIES
SAFETY BOARD

(LOGO)

FEBRUARY 2002

* * *

3. SAFE DISPOSITION OF HAZARDOUS REMNANTS OF WEAPONS PRODUCTION

3.1 STABILIZATION AND STORAGE OF REMNANT MATERIALS

3.1.1 Complex-Wide Program

In Recommendations 94-1 and 2000-1, the Board urged DOE to assess and take action on legacy nuclear materials remaining in defense nuclear facilities. This is an urgent matter because instability of materials and undesirable conditions of storage will worsen with time. Recognizing the degree of uncertainty in DOE's plans to disposition many of these nuclear materials, the Board has consistently advised DOE not to depend on disposition programs to correct near-term safety issues associated with legacy materials. The Board has pressed DOE to promptly stabilize and package these materials into forms that can be safely stored for an extended period of time, to allow time for the materials disposition programs to develop at their own pace without engendering safety issues in the interim.

This approach is most clearly illustrated in the stabilization and disposition of plutonium. DOE initially proposed constructing an Actinide Packaging and Storage Facility at SRS that would stabilize plutonium stored at SRS and provide state-of-the-art storage for plutonium received from throughout the DOE complex, pending ultimate disposition. Subsequently, based in large part on the anticipation of plutonium disposition facilities intended to be constructed at SRS, DOE abandoned this plan, and instead decided to rely entirely on a storage capability retrofit in the K-Reactor facility at SRS (called K-Area Materials Storage, or KAMS), coupled with "just-in-time" shipments of plutonium destined for immobilization.

DOE has now decided to eliminate the planned immobilization capability, and is pursuing a "rapid consolidation" option, in which as much impure plutonium as possible would be prepared for disposal at the Waste Isolation Pilot Plant (WIPP), allowing much of the remaining plutonium throughout the DOE complex to be consolidated in KAMS. However, KAMS is an aged facility with no confinement features for potentially extended storage of plutonium. This approach also fails to address disposition of several tons of plutonium at various sites that is unsuitable for disposal at WIPP and cannot be fabricated into mixed-oxide fuel. Timely actions to render these materials into a form and package suitable for indefinite storage therefore remain vital. DOE has mitigated some of the most immediate hazards, but much work remains to be done, and progress is slow. In January 2001, in response to issues raised by the Board, DOE provided an updated Implementation Plan for completing stabilization of the remaining materials.

The Board did not fully accept this plan and wrote to DOE in March 2001. In this letter the Board identified the need to further expedite stabilization activities at SRS and LANL. In its September response to the Board's letter, DOE presented an acceptable path forward for SRS, but indicated that it was continuing to evaluate whether stabilization activities at LANL could be accelerated. The new approach at SRS is consistent with the Board's observation that stabilization and packaging of plutonium metal and oxide materials could be accomplished in a timely and cost-effective manner using simple equipment in the existing FB-Line facility at SRS.

Because of the slow pace of DOE's development of a firm plan for these activities, the Board issued a letter in November 2001 to the Secretary of Energy that outlined the expected attributes of an acceptable path forward. At year's end, DOE was still working to complete the plans for material stabilization at SRS and LANL. Nearly 8 years have passed since the Board issued Recommendation 94-1 for stabilization of these materials.

In the National Defense Authorization Act for Fiscal Year 2001 (Public Law 106-398), Congress barred the expenditure of funds for decommissioning of the F-Canyon facility at SRS until the Secretary of Energy and the Board jointly submit specified information to the Senate and House Armed Services Committees. The Board is performing a review of complex-wide legacy nuclear materials, including materials not addressed by Recommendations 94-1 and 2000-1, in connection with this statutory requirement.

3.1.2 Plutonium

The Board evaluated the design and safety basis for the plutonium stabilization and packaging system being installed at the Rocky Flats Environmental Technology Site (RFETS). The Board concluded that contamination controls needed to be improved. DOE made such improvements, and in June 2001 the Board was able to make a formal determination that DOE's preparations for startup of the plutonium stabilization and packaging activities were adequate to protect public health and safety.

Preparations for similar stabilization and packaging efforts at the Hanford Site and LLNL were also evaluated. As a result of the Board's scrutiny, the test procedures (based on loss-on-ignition) used to verify the stabilization of plutonium oxides at Hanford's Plutonium Finishing Plant (PFP) were revised to address concerns related to exposure of samples to humid air, cross-contamination of samples, analysis of uranium-bearing materials, and acceptance criteria for the test.

During 2001, RFETS, Hanford, and LLNL each began packaging plutonium in high-integrity, long-term storage containers, beginning the implementation of an important component of Recommendations 94-1 and 2000-1. DOE also began several new stabilization activities and continued progress on others in response to these Recommendations. These measures resulted in:

- initiating a more efficient process for stabilizing plutonium solutions at Hanford, beginning the direct disposal of lean plutonium solutions, stabilizing plutonium alloy turnings that had been stored in oil, and starting

up a new process line that more than doubles PFP's thermal stabilization capacity;

* * *

(2)

Supreme Court, U.S.
FILED
NOV 7 2002
OFFICE OF THE CLERK

No. 02-544

In The

Supreme Court of the United States

JIM HODGES, Governor of the State of South Carolina, in his official capacity,

Petitioner,

v.

SPENCER ABRAHAM, Secretary of the Department of Energy, in his official capacity, and the UNITED STATES DEPARTMENT OF ENERGY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICI CURIAE* SIERRA CLUB, ENVIRONMENTAL WORKING GROUP AND PUBLIC CITIZEN IN SUPPORT OF THE PETITIONER

RENA I. STEINZOR
Counsel of Record
UNIVERSITY OF MARYLAND
SCHOOL OF LAW
500 West Baltimore Street
Baltimore, MD 21201
(410) 706-0564
Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

24 pp

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interests of the *Amici*	1
Summary of Argument	2
Statement of Facts	5
Argument	8
I. DOE's Action was Arbitrary and Capricious	8
II. NEPA Does Not Supplant the APA	10
a. NEPA's Statutory Language and *Vermont Yankee*	10
b. NEPA and the APA Serve Different Purposes	11
III. A Circuit Split Exists Over Whether Other Statutes May Substitute for Judicial Review	12
a. Decisions Correctly Decided	12
b. The Fourth Circuit Creates a Rift Among the Circuits by Incorrectly Conflating the APA's Arbitrary and Capricious Test with Review under the Underlying Statute	15
IV. Importance of APA Review of Substantive Decisions	16
V. Large Scale Impact of *Hodges v. Abraham* on the Nation's Nuclear Policies	18
Conclusion	18

TABLE OF AUTHORITIES

Page

CASES

Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 289 (1975) 10, 11

Baltimore Gas & Electric Co. v. Natural Resources Defense Council, 462 U.S. 87 (1983) 11

Citizens Awareness Network, Inc. v. United States Nuclear Regulatory Commission, 59 F.3d 284 (1st Cir. 1995) 8, 14, 15

Hodges v. Abraham, 300 F.3d 432 (4th Cir. 2002) ..... *passim*

Hodges v. Abraham, No. 1:02-1426-22 (D.S.C. June 17, 2002), *available at* www.scd.uscourts.gov/Orders/Plutonium.pdf 7

Latecoere International, Inc. v. United States of America Department of the Navy, 19 F.3d 1342 (11th Cir. 1994) 17

Maryland Dep't of Human Res. v. United States Dep't of Agric., 976 F.2d 1462 (4th Cir. 1992) 8

Midwater Trawlers Co-operative v. Department of Commerce, 282 F.3d 710 (9th Cir. 2002) 16, 17

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) 8, 16

Puerto Rico Sun Oil Co. v. USEPA, 8 F.3d 73 (1st Cir. 1993) 8, 12, 13

Shoals Am. Indus., Inc. v. United States, 877 F.2d 883 (11th Cir. 1989) 17

Sierra Club v. United States Army Corps of Engineers, 295 F.3d 1209 (11th Cir. 2002) 13, 14

TABLE OF AUTHORITIES – Continued

Page

State of South Carolina ex rel. Beasley v. O'Leary, 953 F. Supp. 699 (E.D.S.C. 1996) 6

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 425 U.S. 519 (1978) 3, 11

STATUTES

5 U.S.C. § 702 12

5 U.S.C. § 704 11

5 U.S.C. § 706(2) 7, 8

16 U.S.C. § 1536 .....13, 14

42 U.S.C. § 9605(a)(8)(B) 6

42 U.S.C. § 4335 10

National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 3155, 115 Stat. 1012, 1378 (2001) 10, 18

OTHER AUTHORITIES

Agency for Toxic Substances and Disease Registry & United States Environmental Protection Agency, *Toxicological Profile for Plutonium* 3 (1990).....5

AMERICAN HERITAGE DICTIONARY (2000)..... 9

DOE, *Amended Record of Decision, Surplus Plutonium Disposition Plan*, 67 Fed. Reg. 19,432 (Apr. 19, 2002) 7, 9, 10

Letter from Sec. Abraham to Gov. Hodges of 4/11/02, Pet. for Cert., App. 102, 103, 106-07 .....7, 9, 10

National Priorities List for Uncontrolled Hazardous Waste Sites, 40 C.F.R. § 300, App. B (2002) 5, 6

TABLE OF AUTHORITIES – Continued

Page

NNSA/DOE, *Disposition of Surplus Plutonium at Savannah River Site* 4-24-27 (Feb. 15, 2002) (available at http://www.nci.org/pdf/doe-pu-214 2002) 6, 9

Ralph H. Petrucci, *General Chemistry: Principles and Applications* 955 (5th ed. 1989) 5

Record of Decision for the Storage and Disposition of Weapons-Usable Fissile Material Final Programmatic Environmental Impact Statement, 62 Fed. Reg. 3014 (Jan. 21, 1997) 6, 9

Supplemental Analysis for Storage of Surplus Plutonium in the KAMS Facility 8, D.O.E./E.I.S.-0299-SA2 (Feb. 2002) 6

United States Environmental Protection Agency, NPL Site Narrative for Savannah River Site (USDOE) (Oct. 4, 2002) (available at http://www.epa.gov/superfund/sites/npl/nar1242.htm) 6

INTERESTS OF THE *AMICI*

Amici Curiae, the Sierra Club, Environmental Working Group (EWG) and Public Citizen respectfully submit this brief in support of the petition for writ of certiorari to the Fourth Circuit filed by South Carolina Governor Jim Hodges.[1] Public Citizen is a non-profit consumer advocacy group with approximately 125,000 members nationwide. The Sierra Club is a membership-based non-profit organization devoted to exploring and enjoying the wild places of the earth and to promoting the responsible use of the Earth's ecosystem and resources. EWG is a non-profit environmental research organization dedicated to improving public health and protecting the environment by reducing pollution in air, water, and food. *Amici Curiae* are organizations dedicated to advocating the public interest in protecting health and the environment, especially with respect to nuclear waste management issues. We are concerned that if *Hodges v. Abraham*, 300 F.3d 432 (4th Cir. 2002) (*Hodges*), is allowed to stand, judicial review of arbitrary and capricious actions by federal officials against sovereign states will be compromised, including actions undermining the ability of the states to protect public health. The circuits are split on this crucial question and in need of Supreme Court guidance. To avert these repercussions, which directly affect our members and are

---

[1] Pursuant to United States Supreme Court Rule 37.6, we submit that counsel for *amici curiae* authored the brief in its entirety. No person or entity aside from *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Governor Hodges, Secretary Abraham, and the Department of Energy have granted consent for Sierra Club, Environmental Working Group and Public Citizen to file this brief

central to our organizational missions, we submit this brief.

SUMMARY OF ARGUMENT

The United States Department of Energy's (DOE's) decision to establish the Savannah River Site (SRS) as the sole long-term storage site for weapons-grade plutonium violated the Administrative Procedure Act (APA), the National Environmental Policy Act (NEPA), and the Defense Authorization Act for Fiscal Year 2002. The *Amici* agree with Governor Hodges that DOE's action violated NEPA and support his petition on those issues. However, because of the broader national implications of the Fourth Circuit's misreading of the relationship between NEPA and the APA for the right of citizens to be protected from arbitrary and capricious government action, this brief focuses on the APA claims.

DOE's action was arbitrary and capricious under the APA and the Defense Authorization for Fiscal Year 2002. DOE's change in policy on the long-term storage of plutonium at SRS was a sudden, significant, and unexplained departure from precedent and was evidently motiviated by improper considerations. In addition, DOE's action was arbitrary and capricious because the new policy failed to develop an exit strategy for plutonium for SRS as required by the Defense Authorization bill for Fiscal Year 2002. Because DOE has not made any plans to move the plutonium waste out of permanent storage, its decisions with respect to SRS will create a major disincentive to minimize or more safely manage plutonium waste.

NEPA procedure does not supplant the APA's requirements for judicial review. NEPA procedure expressly supplements other law and does not repeal any other statute by implication. In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, the Supreme Court concluded NEPA could not be the basis for a "substantial revision" of the APA. 425 U.S. 519, 548 (1978). Now in *Hodges*, the Fourth Circuit's finding that satisfaction of NEPA's procedural mandate automatically results in satisfaction of the APA's arbitrary and capricious review is a substantive change in the APA.

The APA's jurisdiction over arbitrary and capricious final agency actions serves a fundamentally different purpose than NEPA, which is a procedural statute designed to improve the quality of decision-making. Or, to state the matter tautologically, a decision may violate NEPA but be neither arbitrary or capricious. Conversely, a decision may satisfy NEPA but constitute unquestionably arbitrary and capricious behavior. Only by analyzing such claims separately can congressional intent in crafting these distinct avenues for judicial review be preserved. Other Courts of Appeals understand that NEPA and the APA are separate statutes, and the Fourth Circuit's decision is in direct conflict with their precedents.

The Circuits are split over whether underlying statutes may serve as a substitute for the APA's arbitrary and capricious judicial review. The First Circuit and the Eleventh Circuit correctly understand that claims under the APA are separate from claims under other procedural statutes. The Fourth Circuit in *Hodges*, however, incorrectly conflated the APA with the underlying statute. The Fourth Circuit confused a decision regarding an agency's violation of statutory requirements with a decision

whether the agency's action on the merits was arbitrary and capricious. Where the underlying statute is substantive and directly addresses the bureaucratic conduct at issue, prescribing what is acceptable and what is unacceptable with respect to that conduct, this conflation may well have no more than theoretical implications. When, however, the underlying statute addresses process, as in this case, and does not define the substantive consideration that determines the propriety of the agency's actions, the conflation of the court's analysis has the effect of denying petitioners the judicial review that Congress intended them to have. The latter situation is the posture of this case and it deserves this Court's review.

The Fourth Circuit's finding that satisfaction of NEPA's procedural mandates automatically results in satisfaction of the APA blocks states and their citizens from seeking review of blatantly arbitrary and capricious actions by federal officials who seek to run roughshod over the states' assertion of their sovereignty in the arena of safeguarding public health. The public needs the protection that the APA provides from the admittedly rare but nevertheless destructive actions of bureaucrats acting irrationally. APA review affords the essential opportunity to compel review of such decisions by an independent judiciary, serving as a check and balance when the electoral system operates too slowly or imperfectly to deter such conduct. The APA should have served the state of South Carolina well in keeping the nation's nuclear waste processing policy on track; however, the Court of Appeals for the Fourth Circuit abandoned its role in that process.

STATEMENT OF FACTS

Amici adopt Governor Hodges's Statement of Facts and incorporate them by reference. *See* Brief for Governor Jim Hodges, at 1-15, Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit of *Hodges v. Abraham*, 300 F.3d 432 (4th Cir. 2002) (No. 02-544). Below, we add some additional facts and restate the basic chronology of events.

The challenge of safely treating, recycling, or disposing of dangerous radioactive waste has vexed the United States since it began harnessing atomic energy. Plutonium-239, the material at issue here, has a half-life of 24,000 years. Ralph H. Petrucci, *General Chemistry: Principles and Applications* 955 (5th ed. 1989). This characteristic means that 24,000 years must pass for half of the atoms in any given amount of plutonium to radioactively decay. *Id.* at 944. Exposure to plutonium has caused cancer in laboratory animals and it may weaken the human immune system. Agency for Toxic Substances and Disease Registry & United States Environmental Protection Agency, *Toxicological Profile for Plutonium* 3 (1990). When stored in permeable containers, plutonium can leach and seep into soil and groundwater, and from there into surface waters that pose direct exposure pathways for people not only living near such facilities, but many miles away. *See id.* at 89 (explaining that radioactive waste disposal is one of the methods by which plutonium may enter waterways).

Because of poor storage practices in the past, SRS is now included on the Environmental Protection Agency's (EPA's) National Priorities List (NPL) for environmental

cleanup. National Priorities List for Uncontrolled Hazardous Waste Sites, 40 C.F.R. § 300, App. B (2002). The NPL contains the worst environmental waste disposal sites in the country. *See* 42 U.S.C. § 9605(a)(8)(B) (2000) (directing the President to create a prioritized list of the most contaminated sites in the United States). EPA reports that the site is contaminated with plutonium, uranium, tritium, heavy metals, and volatile organic compounds such as trichloroethylene. United States Environmental Protection Agency, NPL Site Narrative for Savannah River Site (US-DOE), *at* http://www.epa.gov/superfund/sites/npl/nar1242.htm (last modified Oct. 4, 2002).

Additionally, as part of the "Atoms for Peace" program, SRS is also the recipient of spent nuclear power fuel rods from foreign nuclear research reactors. *State of South Carolina ex rel. Beasley v. O'Leary*, 953 F.Supp. 699, 701 (E.D.S.C. 1996). The SRS may receive up to seventy-five percent of spent fuel rods from foreign nuclear power research reactors. *Id.* at 703.

In the context of these ongoing problems, when DOE began the decision-making process just sanctioned by the Fourth Circuit, the Department promised to find treatment or recycling options for the plutonium that entered SRS. *Record of Decision for the Storage and Disposition of Weapons-Usable Fissile Materials Final Programmatic Environmental Impact Statement*, 62 Fed. Reg. 3014 (Jan. 21, 1997). By February 2002, DOE had eliminated the treatment concept. NNSA/DOE, *Disposition of Surplus Plutonium at Savannah River Site* 4-24-27 (Feb. 15, 2002), available at http://www.nci.org/pdf/doe-pu-2142002.pdf. Nevertheless, it remained committed to only temporary storage at SRS. Supplemental Analysis for Storage of Surplus Plutonium in the KAMS Facility 8, D.O.E./E.I.S.-0229-SA2

(Feb. 2002). Two months later, abruptly reversing many years of policy and commitments to the sovereign state of South Carolina, Secretary Abraham issued his ultimatum to Governor Hodges, threatening that if the Governor failed to sign DOE's agreement regarding disposal at SRS, DOE would make SRS the nation's sole and permanent burial ground for weapons-grade plutonium. Letter from Secretary Abraham to Governor Hodges of 4/11/02, Pet. For Cert., App. 102, 106-07. Governor Hodges rejected Secretary Abraham's offer because it was not legally binding, so Secretary Abraham followed through on his threat to issue an amended record of decision. *See* DOE, *Amended Record of Decision, Surplus Plutonium Disposition Plan*, 67 Fed. Reg. 19,432 (Apr. 19, 2002).

Governor Hodges immediately sought review of this decision in the District Court for the District of South Carolina on two grounds. *See Hodges v. Abraham*, No. 1:02-1426-22 (D.S.C. Jun. 17, 2002), *available at* www.scd.uscourts.gov/Orders/Plutonium.pdf. First, he argued that DOE had violated NEPA because the Agency failed to prepare an environmental assessment or supplemental environmental impact statement while making its plans for SRS. *Id.* at 4. He also argued that DOE's decision, more specifically its irrational policy reversal, was arbitrary and capricious under section 706(2)(A) of the Administrative Procedure Act. *Id.* at 5. The district court granted DOE's motion for summary judgment. *Id.* at 45.

On review in the Court of Appeals for the Fourth Circuit, the Governor's claims met a similar fate. With respect to the APA claim, the appeals court noted:

> Governor Hodges also maintains that the DOE's decision making process violated the Administrative Procedure Act (the "APA"). Under the APA,

> we must uphold an agency decision if it is supported by "substantial evidence," and is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), (E). In conducting our review under the APA, "we perform only the limited, albeit important, task of reviewing agency action to determine whether the agency conformed with controlling statutes, and whether the agency has committed a clear error of judgment." *Maryland Dep't of Human Res. v. United States Dep't of Agric.*, 976 F.2d 1462, 1475 (4th Cir. 1992). (internal quotations and citations omitted). In view of the DOE's compliance with NEPA, the Governor's APA challenge is also without merit.

Hodges, 300 F.3d at 449 n.17.

ARGUMENT

I. DOE's Action was Arbitrary and Capricious

DOE's action was arbitrary and capricious under the APA because DOE failed to provide a rational explanation for its significant, sudden, and unexplained change in policy on the long-term storage of plutonium at SRS. "When an administrative agency significantly departs from its precedent" it must make a reasonable explanation for the departure. *Citizens Awareness Network, Inc. v. United States Nuclear Regulatory Commission*, 59 F.3d 284, 290 (1st Cir. 1995) (*citing Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 41 (1983)); *Puerto Rico Sun Oil Co. v. USEPA*, 8 F.3d 73, 77 (1st Cir. 1993). Under DOE's precedent, some plutonium at SRS would be converted into fuel for nuclear power plants and other plutonium would be immobilized for transfer to a geologic

site. DOE, *Record of Decision for the Storage and Disposition of Weapons-Usable Fissile Material Final Programmatic Environmental Impact Statement*, 62 Fed. Reg. 3014 (Jan. 21, 1997). From 1996 through 2002, DOE analysis, Records of Decision, and a report to Congress consistently supported a two-track policy with conversion and immobilization. DOE, *Record of Decision*, 62 Fed. Reg. 3014 (Jan. 21, 1997); NNSA/DOE, *Disposition of Surplus Plutonium at Savannah River Site* 4-24-27 (Feb. 15, 2002), *available at* http://www.nci.org/pdf/doe-pu-2142002. Just two months after DOE's 2002 report to Congress, Secretary Abraham suddenly reversed course. After Governor Hodges stated that he would not sign a letter of agreement if Secretary Abraham would not make it legally binding, DOE published a Record of Decision making SRS the site for the long-term storage of plutonium. DOE, *Amended Record of Decision, Surplus Plutonium Disposition Program*, 67 Fed. Reg. 19,432 (Apr. 19, 2002). Such a sudden change in course must be supported by a reasonable explanation in order to survive judicial review under the APA. DOE has not offered such an explanation.

While "arbitrary and capricious" is a legal term of art, Secretary Abraham's action was arbitrary within the ordinary meaning of the term. The American Heritage Dictionary defines arbitrary as "[d]etermined by chance, whim, or impulse, and not by necessity, reason, or principle." AMERICAN HERITAGE DICTIONARY (2000). In an April 11, 2002 letter, Secretary Abraham assured Governor Hodges that DOE was committed to a "credible pathway out" for the plutonium. Pet. for Cert., App. 103. Secretary Abraham then threatened Governor Hodges that DOE would give its 30-day notice to begin shipping plutonium without the negotiated terms protecting that pathway if

Governor Hodges did not sign the agreement. *Id.*, App. 102, 106-107. When Governor Hodges insisted on making the agreement legally binding, Secretary Abraham reversed DOE's policy on long-term storage at SRS. The course of events strongly indicates that Secretary Abraham's action was based on anger and frustration with the negotiation, instead of on a reasoned decision to choose a new long-term plutonium disposal policy.

DOE's reversal was arbitrary and capricious, because the new policy failed to develop an exit strategy for plutonium for the SRS, as required by the Defense Authorization Act for Fiscal Year 2002. In this law, Congress directed DOE to develop a plan for the disposal of plutonium, including the timely removal of plutonium materials from the SRS. National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 3155, 115 Stat. 1012, 1378 (2001). Instead, DOE's amended Record of Decision announced the consolidated long-term storage of plutonium at SRS and failed to develop any exit strategy. DOE, *Amended Record of Decision, Surplus Plutonium Disposition Program*, 67 Fed. Reg. 19432 (Apr. 19, 2002).

II. NEPA Does Not Supplant the APA

a. NEPA's Statutory Language and *Vermont Yankee*

By its express terms, NEPA supplements and does not replace any other statute. NEPA states, "The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal Agencies." 42 U.S.C. § 4335. The Supreme Court has also found that NEPA does not repeal any other statute by implication. *Aberdeen & Rockfish Railroad Co. v. SCRAP*, 422 U.S.

218, 319 (1975); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 425 U.S. 519, 548 (1978). In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, the Court considered whether NEPA allowed a court to require an agency to follow additional procedures beyond those required by the APA. 425 U.S. at 548. The Court held that NEPA did not require additional procedures. *Id.* The Court concluded, "[I]t is clear NEPA cannot serve as the basis for a substantial revision of the carefully constructed procedural specifications of the APA." *Id.* The Fourth Circuit's finding in *Hodges* that satisfaction of NEPA automatically satisfies the APA is a substantive revision of APA procedure and deserves the Court's review.

b. NEPA and the APA Serve Different Purposes

NEPA's procedural obligations are not designed to supplant the APA's obligations. NEPA is a procedural statute designed to create an obligation for an agency to consider the environmental consequences of agency actions. *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983). To enforce that obligation, NEPA grants a cause of action for adversely affected parties. *Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289, 319 (1975). In comparison, the APA is designed to provide a right to judicial review of "all final agency action for which there is no other adequate remedy. . . . " 5 U.S.C. § 704. NEPA does not give a court power to review general arbitrariness. The APA, by contrast, provides a right of review for "[a] person suffering legal wrong because of agency action, or adversely affected or

aggrieved by agency action within the meaning of the relevant statute." 5 U.S.C. § 702.

By confusing NEPA's procedural obligations with the APA's protection against arbitrary and capricious government action, the Fourth Circuit cut off the right to judicial review. By conflating the statutes, the Fourth Circuit removed the APA's substantive protection when it found that DOE satisfied NEPA's procedure.

III. A Circuit Split Exists Over Whether Other Statutes May Substitute for Judicial Review Under the APA's Arbitrary and Capricious Test

a. Decisions Correctly Decided

Several Courts of Appeals decisions support *amici's* interpretation of the law. While one of the following cases involve NEPA claims, others concern the Clean Water Act (CWA) or the Endangered Species Act (ESA). The analysis in these opinions plainly shows that the First and Eleventh Circuits believe the APA's arbitrary and capricious review performs a role separate from reviewing an agency's compliance with an underlying statute.

In perhaps the most strongly worded opinion supporting *amici's* position, the Court of Appeals for the First Circuit considered the EPA's issuance of a pollution discharge permit to Puerto Rico Sun Oil Company. Although the EPA's action conformed with all of the substantive and procedural aspects of the governing statute and regulations, the court still found the permitting decision to be arbitrary and capricious under the APA. *Puerto Rico Sun Oil Co. v. USEPA*, 8 F.3d 73, 74, 81 (1st Cir. 1993). The court wrote:

> EPA's action in adopting the permit in this case is not flawed by procedural mistake. On the contrary, EPA did a commendable job of dotting i's and crossing t's. Nor is there any violation of substantive provisions of the Clean Water Act. . . . The problem with EPA's decision is simply that the outcome appears on its face to make no sense.

Id. at 77. More specifically, the EPA had refused to use a "mixing zone analysis" in granting the permit. *Id.* at 76. This, in and of itself, would have been permissible, but the court noted that the only location where EPA had refused to incorporate such an analysis was Puerto Rico. *Id.* at 78. The court stated that "apparent irrational discrimination" existed in EPA's decision. *Id.* at 78-79. As a result, the court remanded the matter to the agency for reconsideration. *Id.* at 81.

The Court of Appeals for the Eleventh Circuit also recognized that compliance with the underlying statute and compliance with the APA's arbitrary and capricious standard of review are two different questions. In *Sierra Club v. United States Army Corps of Engineers*, Sierra Club challenged the Corps of Engineers' (Corps) and Florida Department of Transportation's (FDOT) construction of a four-lane road running though Hillsborough County Florida. 295 F.3d 1209, 1211 (11th Cir. 2002). The Sierra Club asserted that the Corps had failed to conduct a proper section 7 consultation under the ESA. *Id.* Section 7(a)(2) of the ESA requires federal agencies to ensure that their actions are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical." 16 U.S.C. § 1536(a)(2) (2000). In

order to make this determination, an agency must consult with either the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service before taking action. *Id.* If FWS determines that endangered or threatened species exist in the area of interest, then FWS must perform a biological assessment. *Id.* § 1536(c)(1).

After exploring the intricacies of the ESA, the court found that the Corps had complied with ESA, and for that matter NEPA, when developing the highway. *Sierra Club*, 295 F.3d at 1221. The court then went on to address Sierra Club's arbitrary and capricious claims separately. *See id.* at 1222-23 (explaining that the Corps did not act in an arbitrary and capricious manner by adopting FWS's decision that threatened or endangered species would not be harmed by the highway project). The Eleventh Circuit concluded "[w]e are satisfied that the Corps took a 'hard look' at the environmental consequences of the Suncoast Parkway, *and* that its determinations were not arbitrary and capricious." *Id.* at 1223 (emphasis added).

Finally, in a case that involved nuclear energy issues, *Citizens Awareness Network, Inc. v. United States Nuclear Regulatory Commission*, the First Circuit separately analyzed a Nuclear Regulatory Commission (NRC) decision under NEPA and the APA. 59 F.3d 284, 291-92 (1st Cir. 1995). The First Circuit found that NRC violated NEPA when it allowed Yankee Electric to decommission over 90 percent of a nuclear power plant before conducting a NEPA mandated Environmental Assessment. *Id.* at 292. With regard to the Citizens Awareness Network's APA claim, the First Circuit found that NRC's reversal of its prior decommissioning regulations to allow permanent removal of most major structures and radioactive material prior to the submission of a decommissioning plan was

arbitrary and capricious. *Id.* at 292. Again, the First Circuit realized that an agency's compliance with the underlying statute is a separate consideration from review of the agency's decision under the APA's arbitrary and capricious standard.

b. The Fourth Circuit Creates a Rift Among the Circuits by Incorrectly Conflating the APA's Arbitrary and Capricious Test with Review under the Underlying Statutes

Despite precedents from the First and Eleventh Circuits recognizing the distinctly different purposes served by underlying statutes and the APA, the Fourth Circuit's *Hodges* decision has wrongly conflated an agency's compliance with an underlying statute with satisfaction of the APA's prohibition on arbitrary and capricious administrative decisions. This decision creates a split of opinion among the Circuit Courts of Appeals and *amici* urge this Court to clarify that an agency's decision may comply with the procedural and substantive portions of the underlying statute, but still fail the APA's arbitrary and capricious standard of review. The Courts of Appeals, the states, the administrative agencies, and the people need definitive guidance from this Court that procedurally and substantively complying with an underlying statute does not obviate the need for arbitrary and capricious review under the APA. Given the widely varying subject matter of agency action, the impact of a court, such as the Fourth Circuit, consistently failing properly to use its congressionally bestowed powers under section 706 of the APA could have widespread impact. Without such review, states and private parties would lose their principal

avenue of judicial recourse against federal agencies that inject improper considerations into their decisions.

IV. Importance of APA Review of Substantive Decisions

In a more general sense, plaintiffs need arbitrary and capricious review in order to prevent federal bureaucrats from coming to irrational conclusions in administrative decisions. The Court has long recognized the important role of arbitrary and capricious review to prevent both irrational and improperly motivated agency action. The Court clearly stated this principle when it defined the scope of the arbitrary and capricious standard of review:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on *factors which Congress has not intended it to consider*, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (emphasis added). The Court's admonition regarding use of "unintended" factors encompasses those administrative officials who make politically charged decisions when Congress did not intend for politics to play a part in those decisions. While admittedly rare, cases in which agencies have incorporated illegal considerations into their adjudications do exist.

For example, in *Midwater Trawlers Co-operative v. Department of Commerce*, another case involving the

prerogatives of sovereign states, the states of Oregon and Washington challenged a National Marine Fisheries Service (NMFS) regulation that allocated increased fishing rights for Pacific whiting to four Indian tribes. 282 F.3d 710, 714 (9th Cir. 2002). Because the Court of Appeals for the Ninth Circuit found that NMFS had made a political judgment rather than evaluating the scientific merits of the allocation options, the court deemed the regulation to be arbitrary and capricious – NMFS had relied on factors that Congress did not intend it to consider. *Id.* at 720-21.

Similarly, in *Latecoere International, Inc. v. United States of America Department of the Navy*, the Court of Appeals for the Eleventh Circuit found a U.S. Department of the Navy decision was arbitrary and capricious because it had awarded a defense contract to an American contractor that was otherwise unqualified, while denying that contract to a qualified French contractor (Latecoere). 19 F.3d 1342, 1357-59 (11th Cir. 1994). The court ruled that the Navy had been irrational and had illegally exhibited bias against Latecoere because of the Navy's concerns about the political ramifications of hiring a French company over an American company. *Id.* 1364-65. In reaching its decision, the Court of Appeals for the Eleventh Circuit employed the APA's arbitrary and capricious standard of review to remove illegitimate political considerations from the Navy's decision. *Id.* at 1355, 1364-65. The court recognized that failing to provide relief against the agency's action "would, in effect, repeal Congress' grant of jurisdiction via the APA." *Id.* at 1356 (quoting *Shoals Am. Indus., Inc. v United States*, 877 F.2d 883, 889 (11th Cir. 1989)).

V. Large Scale Impact of *Hodges v. Abraham* on the Nation's Nuclear Policies

Aside from its general removal of a judicial check on agency decision making, *Hodges* has a direct impact on our nation's treatment and storage of nuclear waste. By allowing SRS to become a long-term dumping ground for weapons grade plutonium, DOE eliminates an incentive to quickly process the waste because storage considerations no longer exert pressure to keep pace with the aggregate inbound waste stream. DOE's decision regarding SRS sidesteps this important nuclear waste policy objective.

Besides being poor policy, DOE's action disregards the will of Congress. Congress had directed DOE to develop a plan that would cause "all such defense plutonium and defense plutonium materials [to] be removed in a timely manner from the Savannah River Site for storage or disposal elsewhere." National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 3155(c)(4), 115 Stat 1012, 1378 (2001). DOE's plan to keep nuclear waste at SRS for up to fifty years hardly complies with the "timely" removal requirement. Reuse of plutonium and disposal at a site other than SRS are the overarching policies embodied in section 3155 of the National Defense Authorization Act. DOE failed to embrace those goals in allowing long term plutonium storage at South Carolina's Savannah River Site.

CONCLUSION

This Court should grant the petition for certiorari and reverse the Court of Appeals for the Fourth Circuit's decision. DOE's action was arbitrary and capricious.

Beyond the implications for the Savannah River Site and its environs, the decision incorrectly allows NEPA to supplant APA judicial review. The Circuits are split over whether other statutes may serve as a substitute for the APA's arbitrary and capricious review. In addition, allowing satisfaction of a procedural statute to replace APA review cuts off the right of sovereign states and aggrieved persons to seek judicial review of unreasonable government action. The Fourth Circuit's decision may have a broad impact on future NEPA decisions as well as decisions under other statutes. This case's subject matter warrants the highest level of protection for the people of South Carolina. If allowed to stand, the decision could deter the development of alternatives to permanent storage of plutonium waste.

Respectfully submitted,

RENA I. STEINZOR
Counsel of Record
UNIVERSITY OF MARYLAND
SCHOOL OF LAW
500 West Baltimore Street
Baltimore, MD 21201
(410) 706-0564
Counsel for Amici Curiae

FILED
DEC 13 2002

No. 02-544

In the Supreme Court of the United States

JIM HODGES, GOVERNOR OF SOUTH CAROLINA,
PETITIONER

v.

SPENCER ABRAHAM, SECRETARY OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
THOMAS L. SANSONETTI
Assistant Attorney General
JEFFREY BOSSERT CLARK
Deputy Assistant Attorney General
JAMES C. KILBOURNE
ANDREW C. MERGEN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Department of Energy acted arbitrarily or capriciously, in violation of the Administrative Procedure Act, 5 U.S.C. 706, when it determined to store weapons-grade plutonium at a facility in South Carolina without first adopting a plan to process that plutonium for disposal.

2. Whether the environmental review that preceded the Department of Energy's decision satisfied the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	8
Conclusion	14

TABLE OF AUTHORITIES

Cases:	
Hampton Tree Farms, Inc. v. *Yeutter*, 956 F.2d 869 (9th Cir.), cert. denied, 506 U.S. 816 (1992)	10
Marsh v. *Oregon Natural Res. Council*, 490 U.S. 360 (1989)	12
Constitution, statutes and regulation:	
U.S. Const., Art. IV, § 3, Cl. 2 (Property Clause)	12
Administrative Procedure Act, 5 U.S.C. 701 *et seq.*:	
5 U.S.C. 706	5
5 U.S.C. 706(2)	9
5 U.S.C. 706(2)(A)	7, 10
5 U.S.C. 706(2)(E)	7
Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.*	9
42 U.S.C. 2013	9
42 U.S.C. 2121	9
Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, 116 Stat. 2458	7
Div. C., Tit. XXXI, Subtit. E, 116 Stat. 2470	8
§ 3181, 116 Stat. 2470	7
§ 3181(5), 116 Stat. 2470	8
§ 3181(6), 116 Stat. 2470	8
§ 3182, 116 Stat. 2470	8
§ 3182(a), 116 Stat. 2470	8
§ 3182(a)(1), 116 Stat. 2470	8
§ 3182(b), 116 Stat. 2470	8
§ 3182(c), 116 Stat. 2470	8
§ 3182(d), 116 Stat. 2470	8

Statutes and regulations—Continued:	Page
§ 3182(f), 116 Stat. 2470	8
§ 3183(a), 116 Stat. 2470	14
National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012	11
§ 3155(a), 115 Stat. 1378	11
§ 3155(c)-(f), 115 Stat. 1378	11
National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*	2
42 U.S.C. 4332(2)(C)	3, 12
42 U.S.C. 4332(2)(E)	3
42 U.S.C. 5814	9
42 U.S.C. 7151	9
10 C.F.R.:	
Section 1021.314(c)	3
Section 1021.314(c)(2)	3

In the Supreme Court of the United States

No. 02-544

JIM HODGES, GOVERNOR OF SOUTH CAROLINA,
PETITIONER

v.

SPENCER ABRAHAM, SECRETARY OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-31) is reported at 300 F.3d 432. The opinion of the district court (Pet. App. 32-89) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 2002. The petition for a writ of certiorari was filed on October 3, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Department of Energy (DOE) is responsible for monitoring, storing, and disposing of weapons-grade

plutonium and other nuclear materials in the United States. Pet. App. 7. To fulfill the Nation's ongoing weapons requirements and international non-proliferation commitments, DOE investigated over the last decade three complementary strategies for handling existing stockpiles of weapons-grade plutonium: (1) consolidation and long-term storage of *non-surplus* weapons-grade plutonium for up to 50 years at designated facilities, under standards established by the National Academy of Sciences; (2) long-term storage, under the National Academy of Sciences standards, of *surplus* weapons-grade plutonium at designated DOE facilities including the Savannah River Site near Aiken, South Carolina, pending possible disposition of that material; and (3) disposition of surplus weapons-grade plutonium into non-weapons-grade material. Gov't C.A. App. 22, 161.

The technologies that DOE investigated for disposing of surplus weapons-grade plutonium included immobilizing and storing the plutonium in glass or ceramic forms (immobilization), and burning the plutonium as mixed oxide (MOX) fuel in existing nuclear reactors. Gov't C.A. App. 28-29. As DOE proceeded, however, the agency made clear that it would not necessarily or irrevocably adopt either of those technologies. Instead, DOE determined that "disposition of [surplus weapons-grade plutonium] using these technological approaches would depend on the results of future technology development and demonstrations, site-specific environmental analyses, and detailed cost proposals as well as nonproliferation considerations." *Id.* at 28; see *id.* at 168-169, 211, 215-221, 286.

To support its investigation, DOE developed extensive documentation under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*

NEPA generally requires that when a federal agency proposes a "major Federal action[] significantly affecting the quality of the human environment," the agency must prepare an environmental impact statement (EIS) explaining the environmental impacts of the proposed action and evaluating alternatives. 42 U.S.C. 4332(2)(C). NEPA also requires agencies to consider alternative means of accomplishing the same goal. 42 U.S.C. 4332(2)(E). DOE's agency-specific regulations implementing NEPA's requirements direct that when new issues arise and it is unclear whether they require the preparation of a supplemental EIS, a "Supplement Analysis" must be performed. 10 C.F.R. 1021.314(c). The Supplement Analysis may be the basis for an agency determination that an existing EIS should be supplemented, a new EIS should be prepared, or no further NEPA documentation is required. See 10 C.F.R. 1021.314(c)(2).

In December 1996, DOE issued a multi-volume programmatic EIS that addressed alternatives for storing and disposing of various nuclear materials at sites throughout the United States. Among other options, DOE examined the environmental impacts of consolidating and storing 50 metric tons of surplus weapons-grade plutonium at two designated sites: Plutonium pits (a nuclear weapon component) would be stored at the Pantex Plant in Texas, while non-pit plutonium would be stored at the Savannah River Site. Pet. App. 12-13; see Gov't C.A. App. 77-158. DOE stated in the Record of Decision for that programmatic EIS that only surplus non-pit plutonium from the Rocky Flats Environmental Technology Site in Colorado (Rocky Flats) would be consolidated at the Savannah River Site, and that this action would not occur unless DOE selected

the Savannah River Site for disposition of plutonium by immobilization. See Gov't C.A. App. 171-172.

In July 1998, DOE released a Supplement Analysis assessing a modified plan that called for earlier consolidation and storage of weapons-grade plutonium at the Savannah River Site. The 1998 Supplement Analysis determined that any new or different environmental impacts occasioned by this new proposal were not substantial or significant enough to require the preparation of a new EIS. Gov't C.A. App. 176-202; see Pet. App. 13-14.

After issuing another EIS in November 1999, DOE issued in January 2000 a Record of Decision in which it determined to pursue a hybrid strategy for disposition of surplus weapons-grade plutonium, involving both immobilization and the MOX method. Under the January 2000 decision, both immobilization facilities and MOX-production facilities would be built at the Savannah River Site. See Pet. App. 14-15.

In February 2002, DOE issued a further Supplement Analysis. The conclusion reached in that document was that the environmental impacts of long-term storage of surplus weapons-grade plutonium in an existing building at the Savannah River Site (the K-Area Materials Storage Facility (KAMS))—instead of in an entirely new facility at the Savannah River Site, as was contemplated in the 1996 programmatic EIS and the 1998 Supplement Analysis—would not require the preparation of a new EIS. Pet. App. 15.

In April 2002, DOE adopted the Record of Decision that triggered this litigation. DOE canceled the immobilization portion of the Savannah River Site disposition program and indicated that it would undertake further study of the MOX option. Pet. App. 16. DOE also decided to begin long-term storage of plutonium

from Rocky Flats at the Savannah River Site, as had been considered in the 1996 programmatic EIS. *Ibid.* DOE explained:

> [T]he schedule for site closure and cleanup [of Rocky Flats] is governed by an agreement between DOE and state regulators. Shipments from [Rocky Flats] must begin soon in order to maintain that schedule. While the material is being safely and securely stored at all locations, consolidated storage of this material as [Rocky Flats] is moving toward closure would afford DOE the opportunity to further improve the security of the material and at the same time achieve cost savings.

Gov't C.A. App. 333.

2. Petitioner, the Governor of South Carolina, brought this action against the Secretary of Energy and DOE in the United States District Court for the District of South Carolina, pursuant to NEPA and the Administrative Procedure Act (APA), 5 U.S.C. 706. Petitioner sought to have the federal respondents enjoined from "sending any surplus plutonium from Rocky Flats or anywhere else to [the Savannah River Site] unless and until DOE complies with applicable law." Pet'r C.A. App. 35. Petitioner focused particularly on the claim that DOE had not adequately studied the environmental effects of long-term storage of weapons-grade plutonium at the Savannah River Site, and argued that additional NEPA documentation should have accompanied the agency's April 2002 decision. See Pet. App. 36-37.

The district court entered summary judgment for the Secretary and DOE and denied petitioner's request for a preliminary injunction against shipping plutonium to the Savannah River Site. When granting the govern-

ment's motion for summary judgment, the district court determined that "the fifty-year impacts of storage [of weapons-grade plutonium] in general, and storage at KAMS, in particular, were examined" in the 1996 programmatic EIS and 1998 Supplement Analysis (which examined storage at another facility at the Savannah River Site) and the 2002 Supplement Analysis (which examined storage at KAMS). Pet. App. 64. The court also noted that "in both the 1996 EIS and the 1999 EIS, DOE determined that its storage strategy was not irrevocably dependent on the selection of a particular disposition strategy at any specific time." *Ibid.* The court concluded that "DOE has adequately considered and disclosed the environmental impact of its actions" and that DOE's decision to proceed with storage at the Savannah River Site "is not arbitrary or capricious." *Id.* at 65.

3. On appeal, petitioner argued primarily that DOE's April 2002 decision required additional environmental analysis under NEPA. Petitioner also argued that DOE's decision was arbitrary and capricious, in violation of the APA, because it was "erratic" (Pet'r C.A. Br. 40) for DOE not to implement certain settlement terms it had proposed earlier (under which storage of surplus plutonium at the Savannah River Site would be tied to MOX disposition at that site), notwithstanding that petitioner had rejected those terms when they were proposed (see Pet. 10-12).

The court of appeals affirmed the district court's rejection of petitioner's NEPA and APA challenges. After determining that petitioner has standing to raise his claims (Pet. App. 18-22),[1] the court of appeals

---

[1] Although the court of appeals recognized "that a *parens patriae* action cannot be maintained against the Federal Govern-

agreed with the district court that DOE's earlier analyses did address the environmental risks of storing weapons-grade plutonium in the KAMS facility for up to 50 years (*id.* at 26-28). The court of appeals also rejected petitioner's argument that additional NEPA analysis was required because the April 2002 decision marked the "decoupling of plutonium storage from plutonium disposition." *Id.* at 29. The court explained that in the February 2002 Supplement Analysis, DOE had "examin[ed] its previous NEPA documents, and it concluded that its decision to decouple the storage of surplus plutonium from the disposition clearly did not create any significant environmental impacts." *Id.* at 30. The court determined that before DOE issued the April 2002 decision, it took the "hard look" that NEPA requires. *Ibid.*

The court of appeals separately addressed petitioner's APA argument, explaining that the relevant question was whether DOE's April 2002 decision "is supported by 'substantial evidence' and is not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Pet. App. 30 n.17 (quoting 5 U.S.C. 706(2)(A) and (E)). Addressing that issue, the court determined that "[i]n view of the DOE's compliance with NEPA, the Governor's APA challenge is also without merit." *Id.* at 30-31 n.17.

4. On December 2, 2002, the President signed into law the Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, 116 Stat. 2458. Section 3181 of the new statute sets forth a

---

ment" (Pet. App. 20), it determined that petitioner has standing to challenge the April 2002 decision because, as the Governor of South Carolina, he has concrete "proprietary interests in the land, streams, and drinking water of South Carolina." *Id.* 22.

congressional finding that a "MOX facility will * * * be economically beneficial to the State of South Carolina, and that economic benefit will not be fully realized unless the MOX facility is built." Pub. L. No. 107-314, Div. C, Tit. XXXI, subtit. E, § 3181(5), 116 Stat. 2470. Congress also recognized the State of South Carolina's interest "that all defense plutonium or defense plutonium materials transferred to the Savannah River Site either be processed or be removed expeditiously." § 3181(6), 116 Stat. 2470.

Section 3182 of the new law requires the Secretary of Energy to submit to Congress a plan for the construction and operation of a MOX facility at the Savannah River Site. § 3182(a)(1), 116 Stat. 2470. Section 3182 also addresses adherence to DOE's MOX-disposition schedule (§ 3182(a) and (b), 116 Stat. 2470) and removal of MOX fuel that is produced at the Savannah River Site (§ 3182(f), 116 Stat. 2470). Section 3182 further requires removal of stored plutonium from the Savannah River Site and payments to the State of South Carolina if MOX-production targets are not achieved by specified deadlines (§ 3182(c) and (d), 116 Stat. 2470).

ARGUMENT

The court of appeals' decision on the merits is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, Congress's recent enactment of the National Defense Authorization Act for Fiscal Year 2003 specifically addresses the processing and disposition of plutonium at the Savannah River Site. Further review is not warranted.

1. Petitioner's principal argument is that the Fourth Circuit held "that compliance with NEPA implies compliance with the APA" (Pet. 17), which petitioner as-

serts (Pet. 17-21) is inconsistent with decisions of this Court and other courts of appeals.

a. Petitioner is mistaken about the court of appeals' holding in this case. Contrary to petitioner's claim (Pet. 17), the court of appeals did not hold, or even suggest, that NEPA "repeal[s] the APA." Nor did the court of appeals, having rejected petitioner's NEPA arguments, "refus[e] to go on to consider whether the Department of Energy had violated the APA." Pet. 19. To the contrary, the court of appeals clearly stated that it was undertaking review under 5 U.S.C. 706(2) in order to address petitioner's APA claim. Pet. App. 30 n.17. The court of appeals held, however, that DOE's compliance with NEPA rendered petitioner's APA challenge "also without merit." *Id.* at 30-31 n.17.

b. The court of appeals was correct that the failure of petitioner's NEPA claim doomed petitioner's APA claim as well. The point is not that NEPA "repeal[s] the APA" (Pet. 17), but that petitioner has failed to identify any statutory or constitutional rule, or any principle of administrative decision-making, that is enforceable through the APA and, on the facts of this case, imposes a greater constraint on DOE's discretion than NEPA. The Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011 *et seq.*, confers on the Secretary of Energy broad discretion to manage nuclear materials. See 42 U.S.C. 2013, 2121, 5814, 7151. Furthermore, DOE's compliance with NEPA entailed an in-depth evaluation of issues concerning the storage of plutonium at the Savannah River Site, and the court of appeals concluded that DOE took a "hard look" (Pet. App. 30) at those issues and its assessment of them was not arbitrary or capricious. See *id.* at 24-30. In this case, because the APA did not impose any relevant limitation on the exercise of the Secretary's discretion

that was not already imposed by NEPA, DOE's compliance with NEPA (see pp. 12-14, *infra)* dictated affirmance of the district court's decision on the merits.[2]

The gravamen of petitioner's APA challenge in the Fourth Circuit was that DOE "broke [a] commitment to process surplus plutonium" at the Savannah River Site, "rather than simply store it." Pet'r C.A. Br. 40. In this Court, petitioner likewise maintains that DOE determined to commence storage of surplus weapons-grade plutonium without a firm plan for disposition of the plutonium "[b]ecause [petitioner] would not sign" a proposed agreement under which DOE would have committed to remove plutonium from the Savannah River Site if disposition of the material did not timely proceed. Pet. 22; see Pet. 10-11.

As petitioner's argument makes clear, he is attempting through the APA to enforce proposed settlement terms on which he and DOE *did not* agree. Because the unconsummated settlement proposal does not bind DOE, it was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. 706(2)(A), for DOE to choose another approach after petitioner rejected DOE's effort to avoid this litigation. Cf. *Hampton Tree Farms, Inc.* v. *Yeutter*, 956 F.2d 869, 872 (9th Cir.) (not arbitrary or capricious for agency to proceed with non-settling parties on different terms than with settling parties), cert. denied, 506 U.S. 816 (1992).

---

[2] As petitioner notes, the government argued in the court of appeals that petitioner "had 'no independent APA cause of action *in this case*' and that '[t]he APA *here* is simply the means for effectuating judicial review under the NEPA statute.'" Pet. 15 (emphasis added). Petitioner is incorrect when he claims that the government made a general contention "that compliance with NEPA excuses compliance with the APA." *Ibid.*

Petitioner's citation (Pet. 20) to the National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012, does not bolster his APA argument. Section 3155(a) of that Act required DOE to consult with South Carolina before commencing plutonium shipments to the Savannah River Site (see 115 Stat. 1378), but petitioner's complaint and his statement of the case make clear that the required consultation did occur. See Pet'r C.A. App. 29 (acknowledgment in complaint that petitioner and Secretary of Energy "have consulted" under 2002 Act); Pet. 10-12. Section 3155(c) through (f) of the Act required DOE to prepare a plan for disposition of plutonium at the Savannah River Site, 115 Stat. 1378, but did not give the Governor of South Carolina any special role in the planning process. Furthermore, petitioner did not allege a violation of the 2002 Act's planning requirement in his complaint (see Pet'r C.A. App. 13-36), and he did not rely on the Act in the court of appeals. For all those reasons, the 2002 Act fails to support petitioner's argument that DOE acted arbitrarily and capriciously when it offered petitioner concessions as part of a settlement proposal, but chose not to implement those concessions when the settlement proposal was rejected. See Pet. 4, 20.

In any event, petitioner's objections based on past consultations between DOE and the State concerning the future disposition of plutonium at the Savannah River Site have now been superseded by the provisions of the National Defense Authorization Act for Fiscal Year 2003, which specifically address the disposition of plutonium stored at the Site. See pp. 7-8, *supra*.

Petitioner's invocation of federalism principles (Pet. 21-23) likewise does not add substance to his APA argument. As the court of appeals noted and petitioner does

not dispute, "the responsibility for monitoring, storing, and disposing of nuclear materials, including plutonium, necessarily rests with the federal Government, specifically the DOE." Pet. App. 7. The weapons-grade plutonium in this case is owned by the federal government and shipped to the Savannah River Site in interstate commerce, and its storage on the federal property of the Savannah River Site, pursuant to the Secretary of Energy's powers under the Atomic Energy Act, directly implicates the Property Clause, U.S. Const. Art. IV, § 3, Cl. 2, as well as federal foreign-affairs and national-security powers. Thus, even if petitioner had clearly linked his federalism argument to the specifics of his APA challenge, which he has not done, there is no plausible violation of constitutional federalism principles in this case.

2. Petitioner also objects to the court of appeals' disposition of his NEPA claim, arguing (Pet. 24) that when DOE modified its policy regarding disposition of plutonium stored at the Savannah River Site, the agency necessarily was required to "prepar[e] new reports" addressing the environmental consequences of long-term plutonium storage.

Marsh v. *Oregon Natural Resources Council*, 490 U.S. 360 (1989), which petitioner cites as authority for that claim (see Pet. 24), in no way supports it. *Marsh* explains that an agency subject to NEPA must prepare a supplemental EIS "[i]f there remains 'major Federal action' to occur, and if the new information is sufficient to show that the remaining action will 'affect the quality of the human environment' in a significant manner or to a significant extent *not already considered*." 490 U.S. at 374 (emphasis added) (brackets omitted) (quoting 42 U.S.C. 4332(2)(C)). The court of appeals, affirming the district court, determined in this case that the long-

term storage option DOE selected in April 2002 was specifically and adequately studied in DOE's earlier environmental analyses (see Pet. App. 26-30, 57-65), thus satisfying NEPA's requirements as summarized in *Marsh*.

Petitioner faults the court of appeals' fact-intensive holding on three grounds. See Pet. 25-27. First, petitioner asserts that whereas DOE's NEPA studies assessed the environmental consequences of storing plutonium for as long as 50 years, plutonium might be stored at the Savannah River Site "until kingdom come." Pet. 25. As petitioner suggests, the court of appeals specifically agreed with the district court that DOE examined only "the fifty-year impacts of storage in general, and storage at KAMS, in particular." Pet. App. 28 (quoting district court). Petitioner's argument that DOE has not conducted NEPA review of storage beyond 50 years will become relevant if and when DOE (or its successor) addresses storage beyond the 50-year study period. The argument is not relevant now.

Petitioner next accuses DOE of violating NEPA by deciding on long-term storage first, and "then analyz-[ing] its environmental consequences later." Pet. 26. The sequence of events determined by the district court and the court of appeals, however, is that DOE: (1) set forth options for addressing the weapons-grade plutonium problem, including both a preferred alternative for storage with disposition and the stand-alone storage option that ultimately was selected; (2) studied all of the options; and (3) after initially selecting the storage-with-disposition option, later adopted the stand-alone storage option that it had studied from the outset of the program. See Pet. App. 26-30, 62-64. Consistent with NEPA, environmental review of the storage option selected in April 2002 *preceded* DOE's decision.

Finally, petitioner cites letters to DOE from the independent Defense Nuclear Facilities Safety Board, in which that Board indicated that the KAMS facility was designed to provide only interim storage of plutonium. See Pet. 26-27. The district court addressed that argument as well, concluding that DOE had considered "specific concerns which had been raised by the Defense Nuclear Facilities Safety Board." Pet. App. 54; see Gov't C.A. App. 326-327 (February 2002 Supplement Analysis, discussing results of investigation conducted by DOE and DOE contractor to investigate issues raised by Board). Furthermore, in the National Defense Authorization Act for Fiscal Year 2003, Congress has directed further study of the suitability of the KAMS facility for long-term storage of weapons-grade plutonium. See § 3183(a), 116 Stat. 2470.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
THOMAS L. SANSONETTI
Assistant Attorney General
JEFFREY BOSSERT CLARK
Deputy Assistant Attorney General
JAMES C. KILBOURNE
ANDREW C. MERGEN
Attorneys

DECEMBER 2002